Introduction
The Dialectics of Modern Regulatory Governance

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For decades, questions related to business regulation have rolled politics within industrialized societies and spurred innovative research and vigorous debates throughout the social sciences. What is the appropriate role of the government in structuring markets, defining economic standards, and setting the most basic legal frameworks for economic activity? When should the state try to limit concentrations of economic power, address differences in access to information between economic counterpoints, uphold visions of social equality, or respond to some market failure, in which economic activity causes harms not reflected in market prices? If governments choose to pursue one or more of these regulatory objectives, how should they go about achieving them? What legal strategies and administrative mechanisms make the most sense in particular contexts? How should policymakers balance reliance on technocratic expertise with respect for democratically expressed popular sentiments? These questions have divided schools of thought and political parties since the invention of the modern regulatory state in the latter half of the nineteenth century.

During the most recent two generations, a new set of regulatory debates has helped to structure considerable innovation in the design of regulatory institutions. A wave of deregulation and privatization has gone hand in hand with the creation of scores of new regulatory agencies, in industrialized and emerging economies alike. The accelerating process of economic globalization has at once depended on new regulatory policies, prompted new regulatory dilemmas, and encouraged the fashioning of global mechanisms of governance. These new modes of global regulation have operated mostly through multi-national corporations (MNCs), trade associations, and public interest non-governmental organizations (NGOs). At the same time, advances in information technology have opened the way for novel tools of regulatory governance. Drawing on sophisticated economic theory as well as computer modeling, some legislators and regulators have created auction mechanisms to structure utility markets and cap and trade systems to limit pollution. Outside of the state, some organizations have seized on crowd-sourcing strategies to monitor and shame the behavior of firms around some regulatory goal, especially concerning labor and environmental standards.

The economic stagnation resulting from the Global Financial Crisis of 2007-08 has only heightened the stakes associated with the perennial questions raised by business regulation. Drawing on venerable lines of argument, many conservatives have blamed the global economic slowdown on regulatory overreach. The thousands and thousands of bureaucratic rules that accumulated over the decades, they argue, have cumulatively battered the confidence of
investors, business leaders, and consumers throughout North America and Europe. Progressives, by contrast, point to deregulation and lax regulatory enforcement as central causes of the financial crisis and insist that future economic instability is inevitable unless policy-makers rein in multi-national megabanks and more tightly regulate financial markets. Some progressive thinkers have gone even further. They contend that the ongoing crisis has highlighted weaknesses in influential social science models that presuppose the universality of self-interested economic behavior and the advantages of unregulated markets; presumptions that since the 1980s have underpinned policy-making in many regulatory domains.  

Amid this ferment in regulatory policy-making and at a juncture of such vigorous academic debate, it is good reason to step back and reconsider the rich intellectual legacy suffusing the institutions and strategies of modern business regulation. The English-language scholarship on business regulation, of course, often reflects the enduring philosophical and political divisions about regulatory policy. But much of that scholarship also challenges polarizing views and invites fresh and more sophisticated thinking about how regulatory institutions and policies can best achieve public ends. The three volumes in this Research Collection take on the task of revisiting the interdisciplinary literature on business regulation, from the 1870s onwards. Since this literature assumes truly gargantuan proportions, an initial discussion of parameters and selection criteria is in order.

Business regulation is rarely hermetically sealed from other forms of modern governance, such as the provision of physical infrastructure, social services, and basic security, the furnishing of public insurance mechanisms as tools to cope with risk, or the flexing of fiscal powers, whether via taxation or subsidies. Legislators and executive administrations in complex modern societies tend to fashion policies that combine various policy tactics and tools. Courts also frequently play crucial roles in settling controversies over the interpretation or implementation of particular statutes and administrative orders. Nonetheless, one can usefully distinguish regulation as a distinct analytical mode of democratic governance. It generally involves several basic governing functions. In the first instance, it concerns the articulation of rules, norms, and standards for the conduct of economic life by private firms or state enterprises. It also incorporates attempts to educate firms and the wider public about those rules and the rationales behind them, ongoing monitoring of economic conduct, and enforcement strategies.

Since the late nineteenth century, the technical nature of many regulatory issues has increasingly persuaded governments to delegate these responsibilities to politically insulated regulatory bodies. Rather than attempt to master the details of extraordinarily complex policy questions, especially when they will likely require ongoing factual determination, policy formulation, and adjudication, legislators instead placed authority in the hands of “independent” governing bodies. These technocratic commissions, boards, bureaus, and agencies usually possess large bureaucracies of civil servants who develop expertise in their given regulatory area and are headed by appointees who hold their positions for relatively long periods. Figure 1 offers a rough schematic of modern regulatory governance in its classic form. A democratic legislature confers administrative authority on a bureaucratic entity, which, after a period of fact-finding that typically involves submissions from regulated firms and other interested parties, issues a series of rules. The agency takes on the tasks of educating firms about the new standards and requirements, monitors the marketplace, often through inspections of some kind, and pursues enforcement actions. It also periodically sends formal reports to its legislative overseers (usually committees with jurisdiction over the relevant policy area). The subjects of

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Figure 1: The Basic Structure of Modern Regulatory Delegation

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regulation may challenge an agency’s rules or enforcement actions in the regular courts, which usually retain some power to constrain or even overturn administrative decision-making. But in the normal course of affairs, the agency’s determinations receive considerable deference from other parts of the government.

Regulation in modern democratic polities frequently targets individuals (safety rules for driving, prohibitions on underage tobacco, or alcohol consumption) or public entities (curriculum standards for public schools). The focus on this Research Collection is on regulatory structures for private firms – particularly, though not exclusively, the large corporations that reside at the center of modern industrial and post-industrial economies. Although state institutions typically formulate and implement business regulations, an array of private and quasi-public institutions frequently take on regulatory authority, including trade associations, corporations themselves, and public interest NGOs. In many instances, one can usefully think of regulatory domains in ecological terms – as comprising many different sorts of regulated entities, interest groups that focus on the given policy areas, and regulators, who occupy various niches of governance, possess various sources of authority, and interact with each other and
regulated entities in complex ways. Several selections in this collection, for example, grapple with mechanisms of private regulatory governance and the roles that they play within larger regulatory environments.

Over the past century and a half, academics and regulatory protagonists—the state officials, regulated entities, and public interest groups that closely follow regulatory politics and participate in regulatory decision-making—have sought to make sense of business regulation from many vantage points. Some writers have analyzed the subjects of regulation—the sorts of economic problems that give rise to political pressures for regulation and that lead to select for particular kinds of regulatory strategies, the internal operations of business organizations whose behavior regulators wish to modify, the operation of markets and the competitive dynamics within industries, or even the dynamics within entire economies. Other writers have focused on the workings of regulatory institutions, whether public or private—their institutional architecture and policy mechanisms; the norms and values that comprise their internal cultures; their interaction with regulated firms as they implement and enforce policies; and/or their interaction with other governmental institutions, whether legislative, executive, or judicial.

The resulting research has drawn on a remarkably diverse set of methodological tools from across the social sciences. Conceptual frameworks and research approaches from neo-classical economics and economics-inflected political science have gained the most notice, both inside regulatory institutions and within public discourse. Perhaps as a result, previous compilations, like the 2007 Elgar Research Collection edited by Thomas F. Lyon, The Political Economy of Regulation, have tended to emphasize these lines of analysis. This collection certainly pays attention to economic analyses of the modern regulatory state. It includes several economic interpretations of regulatory politics, a number of economists’ assessments of regulatory impacts, and extensive engagement with the more recent literature regarding regulatory governance and benefit-cost analysis.

At the same time, legal scholars, economic sociologists, cultural anthropologists, institutionalists from political science, historians, and professors of management and engineering have also produced incisive research about regulatory politics and a strong body of empirical work about regulatory governance in action. One of my central goals is to extend scholarly awareness of these alternative ways of understanding the modern regulatory state.

As is usually the case with aggregations of noteworthy scholarly work, many writings earned selection due to their influence, either on streams of later research or on policy formulation and implementation. But I have also chosen several essays because they encapsulate the assumptions and ideas that structured regulatory policy-making at key junctures; and others, especially of more recent vintage, for promising methodological innovation or significant empirical findings. Collectively, the series covers many issue domains and regulatory jurisdictions, though some important arenas, such as telecommunications, healthcare, insurance, education, and privacy, receive little or no direct attention, and national and international regulatory institutions have a more substantial presence than local or regional ones. These volumes also have some claim to offer global perspective, though by far and away most selections engage with regulation in the North Atlantic world, and especially the United States—a reflection of the research preoccupations of English-language scholars and the role of these regions in fashioning the dominant conceptual frameworks and strategies for modern business regulation. (An important research agenda for scholars of modern business regulation is to flesh out the regulatory histories of other societies—both to trace alternative policy trajectories and identify processes of policy diffusion across jurisdictional boundaries.) On the margin, I have opted for lively, accessible writing rather than more technical articulations of key ideas and research findings. (That consideration has led me to lean heavily on contributions to the Annals of the American Academy of Political and Social Science, which, for over a century, has consistently provided a forum for leading intellectuals to articulate their most important views to a broad scholarly audience.)

Finally, my process of selection and organization reflects the sensibilities of an historian. Rather than focusing predominantly on recent theoretical and empirical work, or even the interdisciplinary output of the past half-century, I have taken a longer view. The time frame for these volumes begins in the 1870s, with the origins of modern business regulation. My rationale for this approach partly rests on a historian’s concern about policy amnesia. Surveying institutional and intellectual origins reminds us of the multiple objectives behind business regulation, the contingencies associated with initial attempts at institutional design, and the sometimes striking errors of an age’s experts. Attention to regulatory governance over the longer term, in different societies and policy contexts, encourages appreciation for the role of regulation in constituting markets and the often dialectical character of regulatory change. Chronological depth reveals the way that the structural nature of policy challenges can, over time, channel the direction of regulatory solutions, as well as the possibility that early institutional choices can deflect alternative policy trajectories. It further highlights the variety in responses by policy-makers to enduring tensions within regulatory governance (such as the conundrum of how to reconcile reliance on technocratic expertise with democratic values). Along all of these dimensions, historical awareness can expand the imagination of policymakers and scholars alike.

Engagement with the regulatory worlds of the late nineteenth and early twentieth centuries also underscores the capacity of intellectuals and scholars to enter the fray of policy-making. Either by vocally participating in policy debates or taking on official positions, thinkers in these earlier eras (Edwin Chadwick, Jane Addams, James Landis, John Kenneth Galbraith) frequently reshaped the world by carrying their ideas into the public sphere and the halls of government. One can, of course, point to latter-day examples of the intellectual/ regulatory protagonist, with the lawyer and public interest activist Ralph Nader, the economist and overseer of deregulation Alfred Kahn, and the sociologist and Australian Trade Practices Commissioner John Braithwaite all standing out in this regard. Writing from each of these figures is represented in the pages to follow.

The first two volumes in this Research Collection have an explicitly historical organization, reflecting two distinct periods of business regulation since roughly 1870. Volume I, The Invention of the Modern Regulatory State, covers a longer and more distant period. It explores the creation and maturation of the central institutions and strategies of modern business regulation in the North Atlantic world, a process that took roughly a century and occurred in tandem with the emergence and evolution of modern social science.

Volume II, Regulatory Reform amid a Newly Global World, considers the dramatic reconfiguration of regulatory policy in the three decades since the mid-1970s. Many intersecting developments prompted the more recent reconstruction of business regulation. The reemergence of truly global frameworks for investment and trade dramatically altered the economic and political context for other regulatory domains. At the same time, the economic stagnation of
the 1970s, the subsequent resurgence of political conservatism (especially in the United States, Great Britain, and northern Europe), and several developments within economics (the sharpening neo-classical critique of regulation in action; the elaboration of economic modeling that made market-based approaches to problems like pollution more feasible) all encouraged new approaches to regulatory policy-making. In many ways, the regulatory power of the nation-state retreated as part of the ensuing regulatory reforms; but as we shall see, state authority often reemerged in new guises.

Volume III, Taking Stock of Modern Business Regulation, considers several methodological issues that seem particularly important as foundations for the next generation of research into regulatory governance. It begins with discussions of under-appreciated regulatory epistemologies — the ways that scholars research the dynamics and consequences of regulatory governance and how to “create knowledge” about those matters. This part of the volume explores ethnographic and comparative approaches to the study of regulatory institutions and decision-making. Another section engages with the increasingly significant question of how to assess the impacts of regulatory policy, explored here through instructive examples of both quantitative and qualitative methods for evaluating policy consequences. A final theme returns to the analytical ground of history, considering leading nodes of explanation for substantial regulatory change, whether in institutional design or the adoption of policy tools. The rest of this introduction discusses each volume in turn, placing the various selections in context.

Volume I: The Invention of the Modern Regulatory State

Regulation of business enterprises by state authorities, of course, has an ancient pedigree, a point stressed by John Braithwaite and Peter Drahos in their encyclopedic 2004 book, *Global Business Regulation.*\(^3\) Relatively standard weights and measures; legal definitions of work relationships, whether involving slaves, apprentices, or wage workers; constraints on interest rates; the setting of prices for crucial consumption products like bread; the setting of quality grades for export goods like tobacco, textiles, or beer; requirements that certain types of trading take place in public markets, in accordance with particular norms and practices — every complex human society has enacted myriad such rules to govern economic life. Nonetheless, the sorts of regulatory institutions, strategies, and policies that have emerged as responses to modern industrialization possess some distinctive characteristics. Two important goals of this volume are to assess these distinguishing features and to trace the ways that contemporaneous intellectuals understood them, and indeed often helped to create them.

The first three sections of Volume I trace the key policy motivations behind the construction of the modern regulatory state in Western Europe and the United States, many of which reflected longstanding policy objectives, but some of which broke new ground. These sections comprise essays produced by leading intellectuals who proposed early forms of modern regulation, studied them, or helped to carry them out. As a preface to the discussion of these selections, however, a brief excursion into the relationship between “public governance” and “markets” is in order.

Over the last forty years, many regulatory policy-makers and scholars of regulation have implicitly assumed a binary distinction between the domain of “the market” and the domain of “government.” That is, they have seen “the market” as existing separately from “government,” though the latter may adopt policies that shape the former. For those who have held this view, “regulation” might seek to redress market outcomes that seem unfair, as through controls on price or output; or it might attempt to respond to the unhappy socio-economic side effects of modern economic life, the unfortunate spillovers or “negative externalities” spawned by otherwise efficient production methods, distribution schemes, consumption patterns, or modes of finance. Either way, regulation represented interference with rational market mechanisms; and the operation of regulatory governance was itself thought to operate according to the basic principles of markets, with governmental officials acting as “sellers” and interest groups serving as “buyers.” For most scholars who accepted this way of thinking, support of any regulatory proposal faced a very high evidentiary bar and so had to make a very strong case for its social benefits.

During the last thirty years, however, a number of economic sociologists and institutionalists within political science have rejected this sharp duality between markets and government. These scholars, such as Charles Lindblom, Gerald Berk, Mark Suchman, Lauren Edelman, Neil Fligstein, Marc Einsele, and Daniel Carpenter, have stressed the constitutive and facilitative nature of much regulatory policy. Governance, through regulations, legally defines economic entities and demarcates property rights; it similarly sets standards for goods and services that structure markets and sometimes give rise to them. This analytical perspective insists that “markets” and “regulation” go hand in hand, with the latter helping to construct the former and that regulatory objectives may often be “promotional,” seeking to unleash economic activity, as well as constraining, seeking to curb how firms conduct business.\(^4\) One can see a deep imprint of these ideas in recent scholarly reengagement with the global history of capitalism. This scholarship has reminded us of the state’s profound role in determining the boundaries of slave and free labor; in distinguishing licit from illicit goods, services, financial instruments, accounting maneuvers, labor practices, and marketing techniques; in constructing the basic frameworks of economic organization (the proprietorship, partnership, corporation, trust, holding company, cartel, chaebol, waqf, mutual aid society, etc.). Law, policy, regulation — they all give markets shape, structure, substance, and boundaries, constituting the complex economic niches of capitalist ecology, sharpening the institutional and organizational identities of economic actors. At the same time, of course, market actors always have a hand, and often a heavy hand, in influencing governmental decision-making.\(^5\)

Awareness of this interconnectedness between “state” and “market” has a deep lineage fed into the invention of modern regulatory institutions. It inspired Karl Polanyi’s mid-twentieth century critique of classic liberalism, most powerfully articulated in his 1944 work *The Great Transformation,* along with Weberian approaches to legal and organizational sociology and the Marxist tradition of political economy.\(^6\) It also guided the thinking of legal intellectuals and social scientists who laid the intellectual groundwork for modern regulatory institutions in the late nineteenth and early twentieth centuries, regardless of the disciplinary background or political bent.

Part I: Varieties of Regulatory Purpose: Constituting Markets and the Search for Growth

The first four selections in Part I each grapple with the question of how public regulation delineates property rights and the organizational forms of enterprise. The first two essays Thomas M. Cooley’s “Labor and Capital before the Law”, 1884 (Chapter 1) and Henry Crosby
Emery’s “Legislation against Futures” (1893) (Chapter 2), considered such issues from conservative analytical vantage points; John Spargo’s “Private Property and Personal Liberty in the Socialist State” (1899) (Chapter 3) did so from a decidedly radical perspective; and James Putnam Goodrich’s “The Public Welfare and the Holding Company” (1915) (Chapter 4) reflected the centrist of a moderate Republican lawyer and politician. Each of these writings, however, underscored the role of law and regulation in constituting capitalist business relations.

Throughout a long career as a Michigan judge, inaugural Commissioner of the Interstate Commerce Commission, treatise writer, and legal intellectual, Cooley tenaciously defended property rights, the prerogatives of capitalists, and constitutional limitations on state power. In this 1884 article, he displayed his considerable sympathy for the autonomous creation of norms and customs by economic actors, even amid rapid economic change. Cooley thought the state should not meddle with the rules and practices adopted by bankers, railroad men, and leading figures of other trades, so long as these modes of doing business did not conflict with the public interest. Nonetheless, this conservative jurist simultaneously stressed the significance of government giving legal effect to such customary practices, so as to deepen their impact. He also insisted that public regulatory action was frequently the only legitimate way to mediate the fundamental economic controversies generated within industrial societies. Only government could settle the disputes between farmers and grain traders, on the one hand, and grain elevator companies, on the other, about the appropriate rules for the operation of modern grain markets. Only government could furnish a legal framework for settling the differences between industrial capital and labor unions. Without such legally mandated mechanisms of industrial “self-rule,” Cooley argued, the American industrial economy would devolve into endless bickering and outright violence.

Emery, eventually an economics professor at Bowdoin and then Yale, as well as a Commissioner on the United States Tariff Board, shared Cooley’s respect for the creativity of many business enterprises and the social value of market innovations. His 1895 essay on the regulation of commodity futures came out of the research for his path-breaking Columbia University dissertation, which explained futures markets as beneficial organizational responses to the risks associated with uncertain price movements. The article heaped scorn on the “anti-option” proposals from many farm-state Populist politicians to prohibit short-selling, out of a misguided impulse to raise farm prices. These proposals, Emery insisted, sought to “interfere” with the voluntary operation of speculative markets; they misunderstood the role of short-selling as a crucial balance wheel for such markets, as a check on efforts to force prices upward through manipulation or to execute outright market corners. Here one clearly sees anticipation of the more recent tendency to portray government regulation as a threat to the equilibrium of market activity. And yet Emery, like Cooley, shied away from anti-regulatory absolutism. He conceded that speculative markets generated problems—complaints “tricks” to manipulate market prices in one direction or another; “honeycombed corruption” that was “a disgrace to the exchanges.” And he allowed that such evils might threaten the integrity of marketplaces. As a result, he envisioned an open mind about government regulation of commodity and stock exchanges, especially if legislation, like that recently proposed in Germany, targeted specific trading evils, rather than speculative activity altogether.

John Spargo, a largely self-educated British socialcenter who became a Socialist writer and organizer, shared little of Cooley’s or Emery’s respect for market capitalism. After immigrating to the United States around the turn of the twentieth century, Spargo quickly became a leading writer of the American left. His 1909 essay chiefly sought to acquaint Socialism from charges that it entailed a massive, crippling bureaucracy and posed a dire threat to personal liberty and the existence of small-scale private business. In developing this defense, he reflected incisively on the extent to which all modern property rights depended on government recognition, were framed and sometimes superseded by government regulation, and, in the case of emergencies (fires, earthquakes, epidemics, wars), remained susceptible to seizure. James Putnam Goodrich, a moderate Indiana Republican, would have recoiled from most of Spargo’s politics, but he similarly stressed the role of law and regulatory policy in constituting the basic framework of capitalist enterprise. Goodrich’s analysis of the holding company—a corporation that owned and gave direction to other companies—emphasized that it exerted existence and prerogatives entirely to statutory frameworks. One simply could not envisage such powerful and complex modes of organizing industrial activity separate from the structuring hand of the state.

In addition to defining the legal implications of property and setting up basic frameworks for the organization of complex firms, modern governments also faced questions about how to define the spatial boundaries and channels of trade. Few modern regulatory frameworks have proved more consequential than efforts to shape the geographic reach and distribution of business activity, whether within a federal polity, such as the United States, or between nations. One important issue concerned tariff policy. Through the imposition of taxes on imports, countries like the late nineteenth-century United States and early twentieth-century Germany sought to protect the growth of domestic industries, increasing the price of goods made by foreign firms. A second set of trade barriers involved local commercial regulations, which could also raise the costs faced by firms who wished to sell in a distant market. A third focused on the complex dilemma of ordering economic life within densely populated urban areas.

The next four selections in Part I grapple with these spatial dimensions of regulating business. The 1907 essay in the Yale Law Journal, “Development of the Commerce Clause of the Constitution” (Chapter 5), written by Connecticut Judge Walter C. Noyes, reminded its readers that the United States became a de facto free trade area halluibly, over many decades. Noyes argued that the dramatic expansion of America’s internal trade during the nineteenth century depended crucially on evolving interpretations of the Commerce Clause, which allowed the federal judiciary to constrain the ability of states and municipalities to disadvantage out-of-state firms through discriminatory local regulations. As the historian Charles McCurdy has demonstrated, this process occurred largely after the American Civil War, through creative legal challenges to local regulations mounted by large corporations with national ambitions, such as the Singer Sewing Machine and the biggest Chicago meatpackers. This process of national economic integration, at once prompted by emerging large corporations and encouraging their expanding power, presaged later developments in the late twentieth-century European Union, other regional trade zones, and the global trade framework of the World Trade Organization.

Pestonji Ardesir Wadia’s 1924 essay, “The True Basis of Protection for India” (Chapter 6), explores the implications of international trade regimes from the perspective of a society under the yoke of European imperial control. Wadia, an Indian economist trained in Great Britain, stressed that imperial regulatory frameworks sought to channel the flow of raw materials from far-flung European possessions to the metropolitan factories owned by European firms. One simply could not assess trade regulations or fashion new policies without attention to imbalances in societal economic and political clout. For Wadia, such considerations required careful elucidation of an overall national development strategy for India, as well as suspicion
of then prevalent proposals for "imperial preference," which he saw as thinly veiled means of propping up British manufacturers weakened by World War I.

The idea of using regulatory authority to facilitate industrial development and economic integration also powerfully shaped local policies, particularly in metropolitan contexts. During the late nineteenth and early twentieth centuries, considerable thinking went into regulatory strategies that local authorities might deploy to clear away physical impediments to the growth of urban economies. The most important regulatory innovations along these lines involved the partitioning of urban space into defined economic zones, a process described in the 1925 reflection by Harland Bartholomew, "The Preservation of Economic Waste by City Planning" (Chapter 7). A civil engineer who became a key figure bringing European urban planning to the United States, Bartholomew fully embraced the era's preoccupation, at least among policy cities, with fostering economic efficiency. Part and parcel of a more general urban boosterism that advocated infrastructural investments in transportation, communications, and energy distribution, this approach to regulatory policy stressed the economic advantages of imagining cities and their hinterlands as complex socio-economic and technological systems. If policymakers pored enough attention to the overarching design of the urban built environment, the new city planners argued, they could make cities even more powerful engines of entrepreneurial and economic growth, while reducing the nuisances that plagued many residential areas.10

The greatest ambitions for redrawing the geographic reach of integrated markets imagined the entire globe as the appropriate scope of jurisdiction. In the most recent quarter-century, such an ideal has transformed the institutional context of business activity on every continent. But the intellectual architecture underpinning the most recent process of globalization has deeper origins. The 1915 essay by the economist Foster F. Elliot, "A Proposed World Trade Board for Expanding International Trade" (Chapter 8), suggests early thinking along these lines. Foster, who helped to develop policy over several decades within the United States Department of Agriculture, lays out the case for a new international trade body, which could foster the legal rules that would open up cross-border flows of capital and goods, thereby facilitating postwar reconstruction and global growth. Foster, however, stood clear of the sort of questions that P.A. Wadia had posed twenty years earlier, skipping assessment of whether such trade organization, or how might interact with processes of decolonization.11

Part I closes with discussions of two additional channels through which regulation could drive economic growth - accelerating crucial infrastructure investment and achieving network efficiencies. Samuel Insull, a British immigrant to America and a pivotal entrepreneur in the early American electric utility industry, explored the first of these goals in his 1898 speech, "Standardization, Cost System of Rates, and Public Control" (Chapter 9). This paper concisely explained the economics of electricity, the provision, including the centrality of equipment standardization, economies of scale, marginal cost pricing, and the peculiar dynamics of the "load factor" - a key idea for managing a form of energy that one could not store. Insull also recognized a close connection between the adoption of utility rate regulation and the capacity of utility companies to finance the gargantuan investments necessary to electrify entire cities, thereby achieving the scale and variable timing of demand that could drive down marginal costs. As Insull pointed out in this speech, once public regulatory schemes ensured a profitable rate structure, electricity companies, like their counterparts in Europe, would be able to attract capital for infrastructure investments at considerably more favorable interest rates, thus speeding up the virtuous cycle of service expansion, heightened load factors, and lower charges for industry and residences alike.12

A brief 1921 essay by the economist H. Bruce Price, "Grain Standardization" (Chapter 10), discusses the value of clearly delineated commodity standards for reducing transaction costs. This regulatory objective drove private and public standard-setting in numerous industrial markets, from plumbing fixtures to automobile parts. Price explained its impact on American grain markets, chronicling the decades-long transition from private standard-setting and inspection to state supervision and control. He also probed the complex interaction between the imperative of streamlining distribution of truly enormous harvests and the need to maintain grain traders' confidence in the fairness of their market.

Part II: Varieties of Regulatory Purpose: The Search for Fairness, Stability and Sustainability

The writings in parts II and III return to the perhaps more familiar trope of business regulation as response to the discontents of capitalist development. As these discontents proved to be remarkably varied, so did the aspirations guiding the extension of regulatory authority over corporations and other firms. Nonetheless, one can identify significant patterns. Part II examines the regulatory objectives of fairness, stability, and sustainability, as they pertained narrowly to the operation of markets. As social and political theorists of modernity have stressed since Marx and Spencer, the associated processes of industrialization, urbanization, and economic integration forged a new economic world. Modern capitalism meant truly big business that enjoyed unprecedented concentrations of economic power, business cycles that bunched fromanic booms to calamitous financial crashes, and scrambles to appropriate natural resources. Each of these new conditions prompted wide-ranging regulatory initiatives aimed at business.

The first four selections in Part II explore the related problems posed by monopoly and cartels. Especially in transportation, energy distribution (as Insull's 1898 speech so clearly explained), heavy industry, and the manufacture of consumer products heavily dependent on branding, modern capitalism tended to generate enormous concentrations with huge fixed assets and thousands of employees. These firms enjoyed economies of scale and scope, which they typically used to dominate their markets, either by vanquishing competitors or achieve monopoly power or by cooperating with their larger rivals to fix prices or carve up territories.13

The 1886 essay by the American political economist Arthur Twining Hadley, "Private Monopolies and Public Rights" (Chapter 11), discusses early European and American responses to monopoly, especially in railroading. A longstanding professor at Yale who received his graduate training in Berlin, Hadley provided an incisive early analysis of natural monopolies, in which investment costs are so high that competition leads to destructive inefficiencies. He further contrasts three influential policy responses to this conundrum: attempts to mandate competition, which American state legislatures adopted in the years after the American Civil War to disastrous effect; government ownership, which became the predominant policy in Europe; and regulation of the rates and services of private monopolies, eventually the most common tack taken in the United States.14

Like most nineteenth-century political economists who lived through the age of railroads and steel, Hadley viewed economic regulation primarily through the lens of ensuring fair relations between business counterparties - railroad companies on the one side and shippers
on the other. This latter group included hundreds of thousands of small business owners, who became perhaps the noisiest constituency demanding regulatory fetters for large-scale corporations. Their clamorous appeals, along with those of farmers, provided much of the political impetus behind American antitrust legislation and federal railroad regulation in the late nineteenth century. Deeply skeptical of monopolies, the champions of small-scale proprietors, like the high-profile lawyer and eventual Supreme Court Justice Louis Brandeis, fashioned a caustic critique of ruthless business practices by the new trusts. Brandeis’s 1913 article, “Cutting Prices: The Competition That Kille” (Chapter 12), details this argument for regulatory policies that would restrain predatory marketing by the largest corporations.

Rexford Tugwell’s 1925 essay, “The Economic Basis of Business Regulation” (Chapter 13), demonstrates key elements to the analysis of monopoly profits, which filtered the trend of leading economies, and especially the United States, toward mass production of consumer goods. A Columbia economist who would become a key adviser to President Franklin Delano Roosevelt, Tugwell refocused attention on monopoly around the interests and welfare of ultimate consumers, rather than business counterparts, while stressing the significance of demand elasticity for determining the public interest in regulation. It led to a demand for a good diminished with increasing price, he argued, the more one might worry about monopoly. Drawing on developments in statistical analysis, he also insisted that economists could infer monopoly pricing power and harm to consumer interests from close attention to the movement of prices for inelastic necessities.15

Tugwell recognized that few modern economic sectors had either complete monopoly or perfect competition. Instead, firms in many industries faced some degree of competition and possessed some control over price setting. In such environments, the treatment of cartels mattered greatly. The Harvard historian Julian Klein’s 1928 article for Foreign Affairs, “International Cartels” (Chapter 14), concisely summarized the very different approaches to cartels in the United States, where courts had long refused to enforce price-fixing agreements, and Europe, where the judiciary proved more willing to do so.16

The problem of systemic economic instability receives attention with regard to two important American regulatory arenas. Writing amid the experimentation of the New Deal, Mortimer J. Fox, Jr., a banker and high-level official at the Federal Deposit Insurance Corporation, explores the challenges posed by bank runs in his 1936 article, “Deposit Insurance as an Influence for Stabilizing the Banking Structure” (Chapter 15). Fox depicted government guarantees of bank deposits as a crucial means of checking a cascade of bank failures and economically devastating “involuntary sacrifices” from small businesses and households, as had occurred in the early 1930s. He simultaneously laid out the case for close regulatory oversight of commercial banking, to forestall the possibility that public deposit insurance might encourage risky lending practices and operation on insufficient levels of capital (what economists and policy-makers now refer to as “moral hazard”). Also writing in the midst of the New Deal, the essay by the economist Murray R. Benedict, “Production Control in Agriculture and Industry” (Chapter 16), reflects on the rationale for stabilizing agricultural markets through government price supports. Emphasizing the structural impediments to private control of agricultural output in the face of low prices, Benedict articulated the rationale for a government program that would raise rural incomes through production allotments. Each of these authors offered sustained commentary about the regulatory imperative of limiting the modern business cycle’s capacity to exact extraordinary social costs.17

Even before the Great Depression placed economic stability so centrally on policy agendas, the tendency of individual proprietors and firms to exploit natural resources to the point of extinction had prompted considerable thinking about regulatory policies that would discipline commercial use of such national assets as timber and water. A 1923 essay from the leading American environmentalist Henry F. Hobson Graves, “Public Welfare in Relation to the Conservation of Natural Resources” (Chapter 17), illustrates influential ideas about this regulatory objective, as well as the tendency of elites to approach this question with a focus on owners of larger tracts. A longstanding official of the United States Forest Service and the founder of the Yale School of Forestry, Graves attributed poor management practices on private timber lands to a set of perverse incentives that encouraged very short time horizons by forest owners. In this article, he surveyed a growing set of proposed regulatory restrictions on private landowners to reverse those incentives (especially concerning fire prevention and management, stream water quality, and sustainable harvesting rules). Drawing on European experience with such regulation, Graves cautioned against excessively prescriptive regulatory rules except in the case of fire prevention, and he strongly advocated public ownership to protect watersheds and the dissemination of best practices through public education by public foresters.18

Part III: Varieties of Regulatory Purpose. The Ethics of Social Protection

The next segment of Volume I focuses on the regulatory impulse to redress the social costs associated with the conditions of modern industrialization, even if doing so would significantly constrain the choices of business firms. In many cases, these regulatory frameworks shared governmental aims that stretched back to the early modern period and beyond, though in every instance they reflected the more distinctive concerns of the machine age. Often, these regulatory goals also reflected the priorities of social movements and interest groups as much or more than they did policy experts. Almost always, they reflected a faith in governmental paternalism, in the capacity of the state to look out for the interests of groups that could not fully protect themselves without some helping bureaucratic hands.

One such enduring issue concerned the safeguarding of public morality. In both North America and Europe, an accelerating pace of capitalist innovation generated numerous moral reform movements during the late nineteenth and early twentieth centuries. Reformers worried about numerous social ills, from prostitution and pornography, to opium and other addictive substances, gambling, and the provision of intoxicants. Such business not only thrived in urban neighborhoods; because of the emergence of relatively inexpensive long-distance postal services, at least in the United States, many also found far-flung markets through mail order. The Reverend Henry Colman’s 1899 essay, “Prohibition and Public Morals” (Chapter 18), furnishes a representative expression of this particular breed of regulatory activism. The Secretary of the Wisconsin Anti-Saloon League, Colman invoked the general Christian philosophy of social responsibility as one touchstone of the impulse to restrict access to alcohol consumption. But he specifically rejected scriptural injunctions as a legitimate basis for policy, preferring to make his central case on utilitarian grounds. For Colman, prohibition made sense
because of the social costs imposed by alcohol-related crime, destitution, illness, and impaired work productivity, all of which dwarfed the value of economic transactions that enriched the saloonkeeper and liquor merchant.

Another centuries-old arena of regulatory policy-making—the control of pollution—serves as the focus of John Kershaw's 1908 article, "The Smoke Problem in Large Cities" (Chapter 19). A London engineer, Kershaw became a leading early-twentieth-century British voice for anti-smoke regulation and the central coordinator of a transatlantic conversation about how to curb the scourge of urban coal smoke. In this essay, he compiled a comprehensive overview of foreign anti-air pollution measures with an assessment of the economic costs and deleterious health impacts of British urban smoke, all in the hopes of persuading Parliament to adopt more restrictive regulatory policies. Economists now refer to this kind of social cost as a "negative externality," since its impacts on third parties (in this case, frequent limited visibility in London, poor lung function) were not reflected in the price associated with burning coal, and represented social harms. The British economist Arthur Cecil Pigou first articulated this basic idea in his early twentieth-century book, The Economics of Welfare; but it appeared in many early arguments, such as Samuel Colman's analysis of the social costs imposed by alcohol consumption.

The impulse to redress negative externalities like pollution reflected, in part, concern for the harms that industrial capitalism visited upon innocent third parties. A further cluster of motivations for regulatory constraints involved desires to redress the social imbalances of economic power so prevalent within industrial economies. Advocates of using state regulatory authority to limit such imbalances typically thought of themselves as safeguarding some particular group's vulnerable and deserving group. The word that they most frequently used to describe their goals was "protection." Perhaps no economic counterparty felt the sting of concentrated corporate power more powerfully than industrial workers. Two selections convey early ideas about using regulatory authority to redress the imbalance of bargaining power between industrial corporations and the individuals who received wages for laboring in their mines, factories, and stores. A 1915 essay, "The Social Aspects of the Public Regulation of Wages" (Chapter 20), written by the American economic and social reformer Elizabeth Glendower Evans and published in the American Economic Review, emphasizes the social advantages of using state regulatory power to set a general floor for wages. Robert L. Hale's 1923 review essay, "Coercion and Distribution in a Supposedly Non-Coercive State" (Chapter 21), lays out his influential critique of liberal ideas about contractual freedom. In a world of massive corporations and industrial work processes that minutely subdivided manual labor, Hale contended, equality of bargaining power between employers and individual wage workers did not exist. Instead, the balance of industrial forces remained "vulnerable to great alteration by governmental bodies," whether through arbitration requirements, redistributive taxation, or regulatory policies concerning unions. This basic insight undergirded most late nineteenth- and early twentieth-century proposals to regulate working conditions, hours, and collective bargaining.

Edwin Chadwick's 1884 essay, "Employer's Liability for Accidents to Workpeople" (Chapter 22), focused on one of these areas of protection for workers—the claim that industrial laborers deserved safety regulation. A British lawyer and social reformer perhaps best known for his decades-long work in sanitary reform, Chadwick viewed the growing incidence of industrial accidents through the lens of public health. Reflecting on almost a half-century of engagement with the tremendous carnage in industrial workplaces, Chadwick contended that regulatory policy should seek to place the "responsibility" for accidents "where there is the best means and interest for prevention"—typically with industrial employers. Doing so, ideally through not only liability rules but also safety inspection schemes, would dramatically increase their incentives to improve safety, encouraging better training, more sensible work practices, and the adoption of new, and often more efficient, technology.

Among the working population, one particularly vulnerable category of individuals were the young boys and girls who so frequently toiled in late nineteenth- or early twentieth-century mines, factories, or sweatshops. Jane Addams's 1895 article, "Child Labor Legislation—A Requisite for Industrial Efficiency" (Chapter 23), effectively conveys this theme of demanding that the government protect those too weak and young to look after their own best interests. The Progressive social reformer who founded Chicago's Hull House and kick-started America's settlement house movement, Addams concentrated her energies on improving the urban livelihoods of women and children. In this essay, she deplored paid employment for young children not only because it stunted their emotional development and later life chances, but also because of its negative long-term impacts on economic output—boys and girls who worked in industry lost the opportunity to gain more extensive education, which, Addams suggested, would dramatically expand their productivity in adulthood.

The plight of two other groups—consumers and investors—also prompted growing demands for protective regulatory action. Early advocates of consumer and investor protection usually based their arguments on the systemic instabilities in access to information that accompanied industrialization, which generated complex new technologies and a vast expansion in transactions and consumer-producer interactions with corresponding networks. In some contexts, the informational challenges posed by the rise of integrated continental economies encouraged the emergence of entirely new businesses devoted to closing informational gaps. The mid-nineteenth-century emergence of credit reporting as a niche within financial services, for example, represented a market-based solution to the struggles that wholesalers and manufacturers had in ascertaining the creditworthiness of their far-flung mercantile purchasers. But reformers evinced great skepticism that reputational concerns would inevitably produce new business models that would effectively redress informational asymmetries. In many contexts, policy elites and political coalitions insisted that the state had to mandate information disclosure.

Three selections convey the early twentieth-century regulatory ferment caused by worries about predatory treatment of consumers: the 1914 report by Martin Wilbert, "Pure Drugs and the Public Health" (Chapter 24), a 1934 essay by economists Rolf Nugent and Leon Henderson, "Inflation, Speculation, and the Consumer" (Chapter 25), and Leland Gordon's 1939 commentary, "Protection of the Consumer" (Chapter 26). A pharmacist deeply engaged in the process of professionalization, Wilbert wrote frequently on policy questions concerning drugs. This set of observations points out the gulf in technical knowledge between drug-makers and consumers, and it emphasizes the crucial role of government testing in averting "secures[e] for the consumer a reasonably reliable product."

Writing about installment credit arrangements during the early years of the New Deal, Nugent and Henderson (who by 1934 had already begun to work in the Roosevelt Administration, during which he would take on positions in several agencies) took note of the differential knowledge about legal terms and remedies in an increasingly significant type of consumer sales
contract. The pair based their analysis on extensive research that they conducted as staff members of the Russell Sage Foundation. After documenting the extent to which a significant proportion of consumers lacked a clear grasp of the legal obligations created by installment contracts, and pointing out parallels to the "abuses" that had previously prompted regulation of the market for personal loans, they called for closing the existing "gaps" in America's "regulatory armor." Such ideas anticipated the economist George Akerlof's more formal elaboration of asymmetric information as a problem that, in the absence of regulatory checks, tended to encourage deceptive practices by firms such as used car dealers.

A university economics professor, Gordon served as an academic advisor to the American consumer movement that emerged in the 1970s and 1980s. His essay probed a variety of ways that consumers often remained open to imposition - sometimes through the psychological manipulations of overt deceptions of advertising, sometimes as a result of limited capacity to judge the quality and value of many industrially produced goods - and assessed the historical development of regulatory policies to further consumer protection. At the same time, Gordon remained acutely aware of the practical barriers to enforcement of consumer protection standards and the importance of improving consumer education.

The perplexities of navigating modern financial markets raised analogous anxieties about the lot of investors - especially members of the broad middle-class who possessed some funds, but little sophistication about securities trading and no access to insider information. The economist Theodore W. Glicker's 1939 reflection, "Protecting Investors in Securities" (Chapter 27), offers a succinct statement of early twentieth-century regulatory rationales for safeguarding the investing classes, many of which paralleled the justifications for consumer protection. Investors suffered losses, Glicker observed, because of "dishonest promoters," unscrupulous corporate managers, shady brokers and securities dealers, and the impositions of purportedly reputable investment bankers, as well as their own "ignorance and greed." The article also surveyed the various regulatory initiatives of the previous few decades, contrasting attempts to police the quality of securities offered for sale with policies like the New Deal securities legislation, which relied more heavily on improved disclosure of information.

Collectively, these ruminations about the pervasiveness of abuses against consumers and investors represented a fundamental shift in thinking about the government's role in policing retail transactions, especially in the United States. Public debate moved away from the presumptions of caveat emptor, which largely structured the nineteenth-century marketplace, and toward caveat venditor, which more substantially guided regulatory policy during the mid-twentieth century. This latter sensibility undermined the creation of consumer protection bureaus at the state and local levels during the 1950s and 1960s, as well as a more intense concern of federal agencies, such as the Food and Drug Administration, the Federal Trade Commission, and the Securities and Exchange Commission, with fair treatment of retail purchasers. These writings, however, also suggested important limits to that shift in regulatory emphasis. Both Gordon and Glicker expressed a policy preference for better naming purchasers to look out for themselves, whether through improved flows of private information or strategies of public education.

Part III closes with a consideration of a regulatory goal that flowed not out of the particular dilemmas of industrialization, but rather out of America's democratic political tradition and its long history of racial oppression - the idealism of social equality. Carey McWilliams's 1945 essay, "Race Discrimination and the Law" (Chapter 28), exemplifies the growing demand for regulations against discriminatory employment practices on the basis of race, an impulse accompanied by opposition to discrimination on the basis of creed or national origin. A lawyer, journalist, social activist, and historian, McWilliams stresses the role of discriminatory laws in generating and cementing social assumptions about racial inferiority and the potential for regulatory action to change such social mores, such as through prohibition of employment discrimination.

An important theme recurring through many of the writings in parts II and III is the tendency of regulation's advocates to portray their proposals as means of fine-tuning the evolving industrial system. Business regulation would thus not just attack discrete social evils or address specific matters of injustice; it would simultaneously stoke a society's long-term economic engines. The prevention of banking panics, the bucking up o' rural income, the more efficient harvesting of forests and distribution of grain harvests, the assaults on drunkenness, coal smoke, and child labor; the maintenance of consumers and investor' rust in the fairness of economic transactions - each of these specific regulatory aspirations attracted support at least partly on the grounds that they would foster a more robust, resilient, and productive economy. Even the advocates of using regulation to eliminate prejudice in employment decisions by firms and unions often depicted this policy as clearing away labor market inefficiencies and the threat they posed to maximizing industrial production. The gospel of efficiency suffused just about every substantial regulatory debate of the decades leading up to World War II, even those prompted by the most daunting social harms generated by modern capitalism.

Part IV: Inventing Modern Regulatory Governance: Technocratic Strategies of Institutional Design

The next two sections of Volume I shift the analytical focus toward practical modes of regulatory governance, with separate treatments for strategies of institutional design and more specific policy instruments. As with ideas about regulatory purpose from roughly 1870 through World War II, some of these approaches to governance had a prior (and sometimes a very long) history. But there was a sharper set of transformations in the practicalities of regulatory policy, paralleling the development of the large-scale industrial corporation and its integrated strategies of production and distribution. To appreciate the nature and extent of those shifts, one must grasp the nature of Anglo-American regulatory administration before the last third of the nineteenth century.

During the eighteenth and early nineteenth centuries, European and North American governments adopted all sorts of business regulation. They specified quality standards for imported commodities (tobacco, cotton, textiles) and crucial domestic consumption goods (bread, beer). They imposed port quarantines on arriving ships and required licenses for many occupations. They demanded that banks and insurance companies meet minimum capital reserves. The early modern regulatory web was dense enough to attract stern criticism from Victorian liberals, who wished to free business-owners from the sorts of fetters that bound down Jonathan Swift's fictional Gulliver when he awoke on the island of Lilliput.

Regulatory administration before the late nineteenth century, however, remained ad hoc in character. That is, office holders and inspectors may have developed specialized knowledge relevant to their duties, but this knowledge typically rested on accumulated experience and rules of thumb rather than scientific training or understanding. In the decades after Jacksonianism reshaped American ideas about the appropriate basis of executive office-holding, such officials,
at least in the United States, usually owed their positions to patronage networks within a momentarily victorious political party. Thus American regulatory officials frequendy possessed little or no effective independence from the political system. 10

The regulatory challenges posed by technological change and the greater systemic complexity of increasingly integrated economies, however, eventually pressed policy-makers to imagine more technocratic modes of governance. No groups advocated more strenuously for greater reliance on highly trained experts than the emerging communities of engineers, scientists, physicians, and social scientists in European and North American urban centers. These individuals, who by the 1870s increasingly boasted not just college educations but also postgraduate degrees, often from German universities, evinced great optimism in their ability to comprehend the crucial dimensions of policy problems, to formulate sensible regulatory solutions, and to implement those policies. The resulting development of technocratic strategies of regulatory governance, especially in the areas of social protection, emerged on a transatlantic basis. Ideas, practices, and policies circulated across the Atlantic, through formal university study abroad, journalistic reporting, or formal comparative inquiries by policy commissions.

As the historian Daniel Rodgers shows, before the 1920s, Americans tended to be net societal borrowers from European examples. 11

Part IV begins with two expressions of this burgeoning conviction in technocratic expertise. Elisha Harris's 1878 article, "The Public Health" (Chapter 29), engages with the international movement for sanitary reform. The European roots of sanitarianism reach back into the 1830s and 1840s; in the United States, the extraordinary public health challenges posed by the Civil War and the successes of the United States Sanitary Commission in improving the conditions of military camps gave it significant momentum. A physician and early proponent of sanitary regulations, Harris helped to organize the American Public Health Association. His essay chronicles the expansion of sanitary authority in America, noting the role of epidemics as spurs to policy action and the creation of public health commissions in a growing number of states and metropolitan areas. It further made an extensive case for basing public health policy on the most up-to-date knowledge, focusing on the role of prevention rather than just crisis response, conducting ongoing research into the causes of social harms like disease, and assessing the effectiveness of regulatory policies through careful data collection and statistical analysis. Public health required decision-making by highly educated men of science, not the perhaps well-meaning hacks who only paid attention to public health matters in the midst of an epidemic. 12 (The essay also suggests the fallibility of experts, since Harris, like most of his peers at the time, continued to embrace the miasmatic theory of infectious disease, which located its source in filth, rather than germs.)

In 1878, Harris felt the need to justify expert research as an essential aspect of regulatory policy. Edward B. Ross's 1913 commentary, "The Function of Research in the Regulation of Natural Monopolies" (Chapter 30), suggests how profoundly technical skills and knowledge had come to inform regulatory institutions just a few decades earlier. Ross, for many years the chief statistician at the United States Bureau of Standards, catalogued the extensive array of questions posed by the many regulatory commissions that had come to oversee those utilities - about shifting scientific and technical standards, infrastructure financing, consumer demand, and arcane matters of capital accounting. He also described the maturation of communities of experts, made up of engineers and scientists, many of whom now worked in universities, along with experienced regulatory officials from local, state, and federal agencies. These groups regularly cooperated with one another, sometimes with the coordinating assistance of the Bureau of Standards, to achieve consensus on pressing technical questions, such as the appropriate standards for the quality of natural gas, or the best managerial practices for reducing employee accidents within electricity companies. Because of the work of such technocratic clusters, Ross took pride in the emergence of a mode of governance that had "less dependence on law and the courts, and more on engineers, statisticians, and business experts. 13

Even the savviest experts, however, could not assess the severity of social and economic problems, nor develop sensible regulatory responses to them, without sufficient information about the workings of modern capitalism. The 1902 essay by the influential political economist Henry C. Adams, "What Is Publicity?" (Chapter 31), wrestles with this need for "adequate provision of getting at the facts," focusing on the need for regular flows of trustworthy information about the business practices and finances of the largest corporations, which by the turn of the twentieth century had become such significant forces in shaping American economic life. Implicitly drawing on longstanding British approaches to the regulation of corporate governance, Adams put forward a sophisticated justification for public requirements of corporate information disclosure, which he referred to as "publicity," some years before the emergence of the modern public relations industry would alter the meaning of the term. Corporate disclosure, Adams argued, was necessary not simply to ensure a basic accountability of large businesses to the society at large, but also to empower investors, independent producers, and consumers about the costs and profits of industrial trusts. He also furnished a trenchant elucidation of how government regulation could ensure the provision of quality information through standardized accounting rules, which would allow comparability between firms and industries, and legal accountability for the corporate officials responsible for preparing financial statements. 14

An analogous question concerned the appropriate scope of regulatory jurisdiction in an economy increasingly organized on a truly continental basis. Even with good information and a sensible regulatory strategy, expert policy-makers could not readily respond to socio-economic problems on the basis of local or state authority if those problems were caused by flows of capital and goods across state lines. In the late nineteenth and early twentieth centuries, recognition of this practical reality drove the movement of regulatory politics onto the national stage, with regard to such varied issues as air travel, railroad rates, food and drug safety, forest conservation, banking, agricultural output, and labor relations. The Columbia University economist Henry Seager's 1912 essay, "Labor Regulation a National Social Need" (Chapter 32), nicely encapsulates this tendency. Seager emphasized the limited capacity of state governments to regulate many aspects of labor conditions. Prohibitions or regulations in a given state could not effectively constrain firms based elsewhere, and the capacity of businesses to move their operations convinced many state legislatures to hold off on regulations, out of concern that they would prompt in-state firms to leave. The "we-meaning state," the economist pointed out, had little choice but "to make its labor legislation as lenient as that of its less advanced neighbor with which its industries may be in competition." To avoid what social scientists and political activists now refer to as a "race to the bottom," the national government had to adopt "uniform" labor regulations that compelled every manufacturer in the country to meet the same legal responsibilities.

As American policy elites came to terms with the complexities of industrial production and national patterns of distribution, they increasingly evinced skepticism about legislative capacity to specify appropriate ground-rules for business activity. Some legislators despair of their
ability to keep up with the range of complicated, technical regulatory questions thrown up by the rapid pace of technological, organizational, and economic change; others saw political value in being able to delegate fact-finding and contentious decision-making to another authoritative governmental body. These considerations led to the creation of the independent American regulatory agencies, on the state level in the 1860s and 1870s (as with the New York Board of Health in 1866), and the federal level in the 1880s (as with the Interstate Commerce Commission in 1877). Overtly staffed by technocratic experts and at least somewhat insulated from the hurly-burly of electoral politics, the independent regulatory commission quickly became a standard mode of American governance.

The following pair of selections represent two moments in the resulting turn to the modern regulatory state. Charles Francis Adams, Jr.'s 1871 article, "The Government and the Railroad Corporations" (Chapter 33), reveals some of the thinking of an especially significant figure in the early construction of the regulatory commission. Adams drafted the legislation that created the Massachusetts Board of Railroad Commissioners in 1869, secured an appointment to the Board, and then dominated it for a decade. He used this position, as the historian Thomas McCraw has shown, to forge a powerful regulatory strategy, premised on regular demands for information (about costs, freight and passenger rates, safety practices), rigorous public analysis of that data, and judicious nudging of railroads to adjust their prices, backed up by no small threats of suits for legislative action if they refused to act. The 1871 article demonstrates Adams's keen grasp of railroad economics, as well as the corruption and conceptual crudities that had prevented state legislatures from dealing effectively with ever more powerful, consolidated railroad systems.

It also presented key aspects of his vision for permanent administrative commissions. According to Adams, these institutions should receive clear authority to study changing technological and economic conditions, along with the discretion to refine policies on rates, accounting standards, and safety practices. With such authority, the state would be able to attract regulatory officials of the highest caliber, men who possessed sufficient "experience and ability, ... knowledge of detail, and ... zeal" to meet railroad leaders on a ground of equality. Intriguingly, Adams obscured in this discussion his own practical preference for indirect administrative influence through reasoned suggestion, which he believed would produce a more cooperative stance from corporate executives.

By the 1910s, Adams's vision of administrative regulation had become entrenched at every level of American government. Samuel O. Dunn's 1914 essay, "Regulation by Commission" (Chapter 34), surveys this now commonplace aspect of statecraft from the perspective of a leading journalist and longtime editor of the Railway Age, an important trade journal. Dunn succinctly identified the shortcomings of legislatures, courts, and the "ordinary executive" in dealing with the issues posed by public utilities. All lacked the necessary "expert knowledge;" legislatures lacked the time to give those issues their due; legal process was too "cumbersome;" executive officers had too many other priorities. He also expressed widely held views among elites for policies that would ensure selection of the right sort of regulators — handsome salaries, executive appointment, long terms (to insulate a sense of impartiality), and a requirement of significant experience with the regulated industry, whether through employment or academic study. Dunn further contrasted "weak" commissions, like the Massachusetts Board of Railroad Commissioners, and "strong" ones, that had more authority to make rules, give orders, and enforce them. Reflecting the growing acceptance of technocratic governance, Dunn advocated the extension of public service commission authority beyond supervision of rates, to include working conditions, labor mediation, securities issuance, and corporate accounting. And he insisted that regulators had to possess real authority, "with no interference from the public, or any public body except the courts," and then only when they had acted in a "plaintly unreasonable and unjust" manner.

This last point referenced a significant flashpoint for more muscular regulatory agencies. Affected businesses almost always challenged their operations in court, either demanding the right to appeal regulatory decision-making or seeking judgments that by delegating so much power to unelected government bodies, legislatures had acted unconstitutionally. On occasion, the American judiciary responded sympathetically to such lawsuits. Thus early cases concerning the powers of the Interstate Commerce Commission made its rate decisions subject to wide-ranging appeals to the federal court; and the United States Supreme Court of the early 1900s invalidated the National Recovery Administration, the first Agricultural Adjustment Administration, and the first National Labor Relations Act. Yet even before the New Deal Supreme Court acquiesced to the lion's share of the New Deal, the most conservative justices proved quite deferential to the work of regulatory agencies at both the state and federal level.

Three articles trace this evolution of legal thinking. Ernst Freund's 1914 essay on "Police Power" (Chapter 35) explores the scope of public regulatory authority. Educated at Heidelberg and Columbia University, and for decades a professor of political science and law at the University of Chicago, Freund helped to construct the field of American administrative law. His concise encyclopedia entry laid out a conceptual framework for legislative regulatory rationales and policy instruments (and thus should be read in conjunction with parts II, III, and V of this volume). It also stressed various ways that property rights and individual liberties set limits to regulatory authority, including judicial skepticism about regulation that eliminated the capacity to pursue a business and outright judicial hostility to regulation of wages or work hours. Yet even in 1914, Freund described wide swaths of regulatory policy-making as "clear and undisputed" and detected in others, such as labor regulation, a "transition" toward greater recognition of state power.

The 1927 essay by Felix Frankfurter, "The Task of Administrative Law" (Chapter 36), at once traced the massive expansion of administrative agencies in both the United States and Great Britain and teased out its implications for legal culture. A Harvard law professor who would become a key adviser to Franklin D. Roosevelt before receiving an appointment to the United States Supreme Court, Frankfurter portrayed unelected regulatory bodies, while their emphasis on technical fact-finding and considerable administrative discretion, as an inevitable byproduct of industrial society. But he simultaneously worried about how to regulate the regulators, so that the new institutions would prove "at once adequate to social needs and the protection of individual freedom." To avoid the dangers of "arbitrary" exercises of raw administrative power, the Harvard legal scholar looked to the development of a professional civil service, the development of procedural norms within the new agencies, sufficient transparency to ensure "public scrutiny," and vigilant "criticism of an informed and spirited" legal community. Yet even as lawyers and judges imposed such restraints, they also had to remain alert to the complex social and economic facts that had driven the creation of regulatory commissions in the first place and understand the distinctive organizational cultures that structured policy-making in particular agencies.

James Landis's 1938 article, "Administrative Policies and the Courts" (Chapter 37), built on Frankfurter's premises. Also a renowned Harvard law professor, Landis had become, by
1937, the chairman of the new Securities and Exchange Commission. Here he argued for even greater room for administrative maneuver. In addition to having a final say over findings of fact, so long as they could show reasonable economy and a reasonable basis for their determinations, agencies should ordinarly possess the authority to give shape and meaning to ambiguous terms crucial to their policy mandate, such as “reasonable rates,” “unfair method of competition,” or “manipulative, deceptive, or fraudulent” selling practices. Expertise in fact-finding, Landis insisted, blended into expert judgment about the rules and bounds of legal definition. And such freedom of action was crucial to giving administrative bodies the capacity to act swiftly, sidestepping the interminable delays of appeals through the traditional courts.

As the number of expert regulatory commissions mushroomed, corporations, trade associations, unions, farmers, and other interest groups soon recognized the importance of developing strategies for interacting with them. By the same token, regulators quickly worked out the importance of fashioning their own strategic approaches to these groups. The 1942 essay by the political scientist Avery Leiserson, “Interest Representation in Administrative Regulation” (Chapter 38), addresses this pivotal feature of regulatory politics. A one-time National Labor Relations Board field examiner, Leiserson had an excellent grasp of “law in action.” This article probed the often relentless efforts of various interests to shape regulatory outcomes, either through the initial legislative debate over the design of regulatory institutions, informal contacts with agencies once created, or attempts to overturn regulatory decisions by lobbying legislators and/or the executive branch. The resulting input, he observed, raised a danger of breaching administrative independence, especially if interest groups controlled regulatory appointments. But “consultation” often improved regulatory decision-making, especially through informal conferences and advisory committees. It “served as an indispensable discretionary practice, a technique of group education (and education for administrators as well), a preliminary indication of the reasonableness of administrative rules, and a device for securing co-operation with official action.”

A second crucial theme of Leiserson’s article concerned the extent to which America’s public regulatory institutions had formally delegated crucial dimensions of regulatory implementation and oversight to self-regulatory bodies. By the early 1940s, such arrangements existed in areas such as professional licensing, truth in advertising, and the marketing of coal, agricultural commodities, and securities. Analogous blurring of public and private modes of regulatory governance had long occurred in Europe. Such outsourcing of authority, Leiserson reflected, raised complex questions of jurisdiction and tended to shift policy toward “conservatism.”

David Boedman’s 1968 essay, “Safety and Systems Analysis, with Applications to Traffic Safety” (Chapter 39), rounds off Part IV with a consideration of the engineering sensibility that sustained many post-World War II regulatory agencies. A civil engineer and business consultant, Boedman applied the then relatively new science of operations research to the regulatory world of automobile safety. His article encapsulated the emerging thought about the regulatory implications of complex technological and organizational systems, in attempting to foster safety within something so complicated and tightly interlinked as a road system—in trying, in other words, to prevent traffic accidents while sustaining efficient modes of transport—regulators had to think as much about systemic constraints and consequences as about any discrete element of the system. They had to consider basic infrastructural design features and technological standards for automobiles, as well as rules for drivers. Truly expert safety regulation, Boedman suggested, required at least as much attention to designing the transportation environment as it did to modifying driver behavior. It further demanded rigorous attention to the complex systemic reverberations of any contemplated regulatory change and explicit weighing of policy trade-offs, including a comparison of costs and benefits.56 (In several respects, this selection represents a transition to Volume II, which addresses the recurring themes during the last 40 years of how to manage conflicting regulatory goals.)

Part V: Inventing Modern Regulatory Governance: An Expanding Range of Policy Instruments

In Part V, the focus shifts onto the narrower terrain of policy tools. Readers will note that many of the foregoing selections already furnish commentary on some of these more specific regulatory instruments. Some degree of overlap is inevitable, since writers who examined regulatory governance frequently did not confine their analysis to instruments for regulatory action, or broad conceptual frameworks for understanding regulatory problems, or strategies of institutional design, or questions of policy tactics. Each of these aspects of regulatory policy shaped thinking about the others. A particular rationale for governmental regulation often drove the formulation of specific policy tools.

This relationship emerges especially clearly in the case of modern zoning, perhaps the policy instrument that most directly demonstrates how regulation can constitute markets and structure business activity. Independent zoning authorities first emerged in American cities as a way to reduce congestion, assist infrastructure planning, and reduce the industrial nuisances visited upon residential districts, particularly of the well-to-do. But as indicated by Walter Rowland’s 1933 essay, “County Zoning for Agriculture, Forestry, and Recreation in Wisconsin” (Chapter 40), this mode of governing the use of space soon expanded beyond urban confines. A state agricultural official, Rowland’s initiated rural zoning in Wisconsin. His commentary illustrates the overriding premises of this regulatory power: dispassionate consideration of ordered economic development, with a focus on directing investments and business activities to where they make most economic sense; attention to minimizing negative externalities, in this case forestry practices that might increase fire risks or harm waterways; and extensive opportunity for residents to offer their views as part of the process.

Two selections by economists offer vantage points on the mechanics of regulating prices or rates through quotas or other constraints on supply, a subject addressed at least partly by a number of earlier pieces. This policy tool emerged in the United States as a means of securing the efficiencies associated with natural monopolies in transportation and utilities, without moving to full-fledged public ownership. In other countries more comfortable with nationalization, price, and entry regulation became especially common in agriculture during the deflation of the 1920s and 1930s. Simon Hanson’s 1936 article, “Argentine Experience with Farm Relief Measures” (Chapter 41), offers a close look at the actions taken by newly created Argentinian government marketing boards, which responded to the Great Depression through various measures intended to curb output as a means of raising commodity prices. Even more ambitious attempts to regulate prices occurred during World Wars. John Kenneth Galbraith’s “Price Control: Some Lessons from the First Phase” (Chapter 42), written in 1943 after Galbraith’s had two years of experience with the United States Office of Price Administration under his belt, reflects on the conceptual and managerial challenges faced by that agency. Galbraith explained the very different requirements of price controls for monopolistic,
The development of economies of scale and scope within industrial sectors, as we have seen, prompted quite different policy responses in Europe and the United States, with European legal authorities proving far more amenable to controlling business abuses in the interests of promoting stability on chaotic markets. In at least some sectors of the economy, however, American policy-makers made peace with analogous forms of business self-regulation. The economist Robert Riegl's 1927 essay, "The Regulation of Fire Insurance Rates" (Chapter 43), reports on an early form of regulated self-regulation. Under this legislative approach, non-governmental insurance ratings bureaus had the chief responsibility for gathering loss data, establishing risk classes, and developing premium schedules. But the ratings bureaus had to furnish extensive data about their operations to state insurance boards, which had the power to investigate the bureaus, adjust rates, and enforce non-discrimination requirements.

In the core domains of manufacturing and distribution, American policy-makers retained considerable autonomy to both price-fixing arrangements and outright monopoly, though regulatory aggressiveness ebb and flow in response to electoral outcomes and the evolution of economic theory. Thurman Arnold's 1940 essay, "Antitrust Law Enforcement, Past and Present" (Chapter 44), concisely presents the prevailing assumptions about how regulators sought to keep corporate behemoths from abusing their power. A former Wyoming politician and Yale law professor who became head of the Justice Department's Antitrust Division in 1938, Arnold was a central figure in the intellectual movement known as "Legal Realism," which sought to understand how law reflected the impact of economic and social power. In this article, he depicted antitrust regulation as essential for the maintenance of democracy in industrialized countries and explained past weaknesses in enforcement as largely a function of woefully inadequate bureaucratic capacity. Advocating comprehensive, factual assessment of every important industry to guide prosecutorial strategy, Arnold stressed that vigorous regulation would give businesses much clearer signals about legal boundaries, while freeing "ordinary law-abiding" managers from the competitive pressures to break the law. But this kind of intensive oversight depended on sufficient regulatory resources to hire the necessary lawyers, economists, and statisticians to remain abreast of evolving industrial conditions and thus to retain the government's capacity to redirect industry structure.

The problem of informational asymmetries tended to give rise to policy instruments that would close the knowledge gap between sellers and buyers, sometimes through simple requirements that businesses supply information sometimes through more far-reaching regulatory frameworks. William Z. Ripley's 1932 essay, "Public Utility Insecurity" (Chapter 45), called for the former kind of policy, in response to a series of accounting scandals and bankruptcies at public utility holding companies, including Samuel Insull's electricity empire. Those corporations had developed a "financial labyrinth" of complex ownership structures linking operating companies to their corporate parents. Ripley, a professor of political economy at several prominent universities who became a leading critic of lax financial regulation during the 1920s, supplies a classic statement of the case for disclosure as a regulatory policy. The government, he argued, had to force public utility holding companies to "let in the light of day," opening up their books to independent audits according to mandated standards of accounting.

Information disclosure has always constituted one of the least intrusive regulatory options at the disposal of modern states. Samuel Hopkins Adams's 1908 report, "The Solving of the Milk Problem" (Chapter 46), investigates a more robust regulatory approach to informational imbalances in a given market—that of quality certification, connected, in this instance, to safety certification. Adams, one of the most important muckraking journalists of the Progressive Era, frequently directed his research toward public health questions. In this article, he assessed a comprehensive scheme in Copenhagen to ensure that its residents had access to unadulterated, healthy milk. The city required all milk vendors to register with its sanitary police, who, along with the Board of Health, periodically inspected their shops to ensure they complied with an extensive set of health regulations. The Board of Health further demanded that vendors be able to verify their supply chains and the good practices of their dairy farms and transporters, and that they clearly label milk containers by their amount of fat content. Copenhagen's regulatory system also relied on a significant degree of regulatory action by a non-profit marketing organization, the Milk Furnishing Society. This organization educated dairies about how to keep cattle free from disease, sent out veterinarians to inspect milk cows, and oversaw distribution to retailers throughout the city.

In some technologically sophisticated markets such as pharmaceuticals, policy-makers eventually combined the more substantial scientific capacity with novel gate-keeping functions. Ralph Smith's 1956 article, "Assuring the Safety of New Drugs" (Chapter 47), crisply surveys the resulting structures of approval regulation. As Smith, the head of the United States Food and Drug Administration's testing branch, pointed out, companies wishing to market a new drug not only had to convey extensive information about ingredients, manufacturing methods, and intended uses, but also had to undertake extensive testing on animals and chemical tests on human subjects, with rigorous attention to regulatory standards for such testing. Such research would only prove worthwhile in Smith's view, however, if regulators possessed the scientific expertise to assess data about toxicity levels and the incidence of unwanted side effects.

Part V winds up with a discussion of the regulatory ambition to foster macroeconomic stability through monetary policy, "The Stabilization of Prices and Business" (Chapter 48), written by the Wisconsin institutional economist and historian John R. Commons in 1925. Predominantly a scholar of labor regulation, Commons here considered the various instruments of monetary policy developed by the American Federal Reserve in its efforts to moderate swings in the overall price level, as well as systemic stresses caused by the international monetary fall-out of World War I. The essay highlighted the conceptual challenges faced by regulators charged with smoothing out the modern business cycle, a daunting task that demanded attention to vast amounts of data and the capacity to envisage the workings of an extremely complex financial system. Commons also took note of significant intellectual barriers to counter-cyclical monetary policy, including not only wrong-headed prevalent "rules of thumb," but also the difficulty that many economic constituencies and politicians had in distinguishing the relatively tangible level of demand or prices for specific goods from "statistical abstractions" such as aggregate demand and shifts in the general price level. This analytical disconnect between the regulatory experts, on the one hand, and many businessmen, politicians, and the general public, on the other, represented a crucial justification for creating insulated institutions like the Federal Reserve. But it also signified an ongoing set of tensions between these independent regulators and both elected officials and their constituents.
Part VI: Critiques of Modern Regulatory Governance

The establishment of independent regulatory agencies placed remarkable power in the hands of unelected experts. Unsurprisingly, as soon as this new mode of governance began to appear in the late nineteenth century, it attracted stinging critiques, most of which have recurred in recognizable forms over the decades. The writings in Part VI illustrate the most influential complaints about the impact of modern regulatory governance. (One can discern traces of these arguments throughout parts II through V, as some authors responded to one or another criticism of modern regulation in theory or practice; just as several of the writings in this segment of Volume I offer additional detail about specific regulatory strategies and policy instruments.)

The late nineteenth-century British social theorist Herbert Spencer, best known for his application of Darwinism to competition within human society, produced an early attack on regulatory authority as a grave threat to individual liberty. Spencer’s 1884 essay, “The Coming Slavery” (Chapter 49), linked regulatory constraints on businesses to the public provision of social welfare. Attempts to improve workplace safety or to furnish some means of income to the destitute, Spencer argued, fed off each other. Every time that the government assumed some new paternalistic power, it created a new aggravating bureaucracy and strengthened the political momentum for additional expansion of public functions. Even if individual assertions of regulatory power had some merit, they collectively infantilized members of a society, acculturating them to dependence on a protective state and weakening their capacity to look out for themselves or chart their own course.

A related concern about the exercise of modern regulatory authority highlighted its tendency to ignore longstanding understandings of Anglo-American legal culture. Convinced that legislatures could not respond sufficiently quickly or with enough specificity to the complex and ever-changing policy demands of modern economic conditions, the architects of public health boards and public utility commissions infused them with considerable discretion. But that freedom of action struck some legal theorists and political philosophers, along with myriad disaffected businessmen, as inconsistent with the rule of law. The British judge Albert Venn Dicey forcefully articulated this position in his influential 1885 treatise, An Introduction to the Study of the Law of the Constitution. Dicey contended that in order to conform to the rule of law, every act of public administration had to be subject to searching review in the ordinary courts of law. Regulatory bureaucrats could not possess the final word on the extent of their own jurisdiction. Numerous writers elaborated on Dicey’s arguments over the subsequent decades, including the British jurist Lord Gordon Hewart, the American legal realist Roscoe Pound, and the Austrian economist and conservative political philosopher Friedrich von Hayek. A chapter from Hayek’s 1960 volume, The Constitution of Liberty, pulls together the central thrust of these assaults on excessive administrative authority and discretion (Chapter 50).

Although Hayek evinced considerable skepticism about the advisability of a great deal of modern regulation, he readily conceded that “a functioning market economy presupposes certain activities on the part of the state,” and that the “benefits” of many “coercive” regulatory policies, such as restrictions on industrial pollution, or “the production and sale of phosphorus matches,” might exceed their social “costs.” He further allowed that many regulations would be adopted by administrative agencies, rather than “democratically elected” legislatures. But he insisted that government policy had to operate via “general rules” that it clearly articulated to its citizens and business firms; and that in the inevitable cases of ambiguity, the arbiters of legal responsibility had to be the regular courts, operating in full public view, according to the normal rules of evidence and the constraints of precedent. This set of principles represented the core values of the Anglo-American legal system, constituting crucial bulwarks for economic freedom. Without such legal clarity and procedural protections, individuals and businesses could not effectively plan for the future. For Hayek, any attempts at fixing prices would inevitably prove to be chaotic, while compelling the state to allocate output quotas through “ad hoc decisions that discriminate between persons on essentially arbitrary grounds.” Thus all price, rate, and rent regulation compelled state officials to run roughshod over the rule of law.

Some critics of independent regulatory institutions worried less about their impact on personal freedom and bedrock principles of legal culture than about the threat that they posed to democratic principles. The American political scientist Harold Dodds explores this concern about democratic legitimacy in a 1937 essay, “Bureaucracy and Representative Government” (Chapter 51). Dodds used the conservative political assaults upon the innovations of the American New Deal to frame a more general assessment of independent, expert regulatory governance and the possibility that highly trained career civil servants would become “the masters rather than the servants of the people, scaring that dependence on public opinion which is the essence of popular government.” This anxiety, he contended, had deep resonance in America, given its long commitment to Jacksonian principles of public service (a preference for rotation in office and for keeping administrative duties “simple and plain,” in Andrew Jackson’s famous formulation, “that men of intelligence may readily qualify for its performance”). Although cognizant of the complexities of regulatory decision-making in industrialized societies, and thus the advantages of expert public administration, Dodds trenchantly catalogued its ills—“worship of routine,” “slavery to red tape,” “excessive formalism,” a tendency to push the bounds of jurisdiction and downplay aspects of the common good not implicated in a given institution’s regulatory mission. He accordingly called for the cultivation of an administrative culture “deeply steeped in the peculiar responsibilities which surround public office in a democracy,” a goal requiring specialized education in public service. He further insisted on careful delineation of regulatory authority, so that legislative bodies could more effectively “watch over” its exercise.

The intellectuals who reproached modern administration for violating ideals of economic freedom, the rule of law, or the requirements of democratic process tended to raise concerns about fairness. They fretted about unaccountable, aggrandizing officials who favored some supplicants over others without good reasons. Numerous thinkers extended this line of critique over the middle decades of the twentieth century, rounding the drum about the illegitimate influence of tightly organized business groups over regulatory decision-making. Two images came to dominate this scholarship, which eventually generated scores of studies—rent control, as regulatory rules effectively protected regulated incumbents from many avenues of competition, and capture, as regulated firms astutely cultivated relationships with regulators, essentially gaining control over regulatory processes.

Four selections exemplify this strand of skepticism about modern regulatory governance. A 1939 essay by the Austrian economist Oskar Morgesein, “The Experience with Public Regulation and Public Monopoly Abroad” (Chapter 52), described the process by which price regulation in a given market, such as milk supply in Austria or grain supply in Czechoslovakia, inevitably generated supply quotas and enormous profits to the businesses privileged to receive
allocations, all paid for by the mass of consumers. Margenstern also suggested that price supports tended to encourage intense political lobbying by favored firms, who fervently wished to retain regulatory protections.

The next selection, George Stigler’s 1971 article, “The Theory of Economic Regulation” (Chapter 53), stands out as perhaps the single most well-known academic writing on the regulatory state, with more than 9300 citations tracked by Google Scholar as of this writing. An economist at the University of Chicago, Stigler devoted much of the 1960s and 1970s to economic analyses of regulated markets. In this article, Stigler presented extensive evidence about the impact of various regulations, suggesting that they overwhelmingly benefited regulated firms. He then developed a model of “supply” and “demand” for regulation. The delegation of regulatory authority by legislatures, Stigler contended, almost always occurred in response to persistent requests from firms and trade associations that expected to gain from such policies, especially through the creation of sectoral barriers to entry and the regulation of prices. These firms took advantage of general public apathy about most issues, as well as their superior knowledge about the relevant issues and their capacity to provide campaign donations, to exert disproportionate influence over the political process.

By the early 1970s, the view of industry regulators as cat’s paws of regulated firms had become widely held across the political spectrum, as indicated by Mark Green and Ralph Nader’s 1973 essay, “Economic Regulation vs. Competition: Uncle Sam the Monopoly Man” (Chapter 54). Social activists and public interest lawyers, Green and Nader were two of America’s most influential voices for consumer protection, at the time both working through the NGO Public Citizen. In this essay, they voiced a good deal of skepticism about many justifications for price regulation, such as the supposedly durable character of natural monopolies or the imperative of guaranteeing services to underserved areas. They additionally identified a history of “operational woes” afflicting most of the old-line industry-specific regulatory agencies, none more significant than the consequences of undermining “business pressure.” Big corporations “ever a continuous, one-sided regulatory presence, dominating agency decisions by the sheer quantity of argument”; they frequently nudge officials through informal “et cetera contacts”; they sometimes get their way through “outright corruption.”

Because of the regular personal interchange between agency and industry—the circulation of employment that would become known as the “revolving door”—corporations could usually count on regulators to take particular cognizance of their priorities. These practical realities meant that in rate-making processes, corporations enjoyed great scope to inflate their costs through imaginative accounting and rarely had to worry about official challenges to the proposed tariffs suggested by industry rate conferences. Entrenched corporations similarly retained considerable power to thwart the entry of competitors into their markets and to arrange corporate mergers that might further restrain competition. For Green and Nader (like Stigler), regulatory institutions typically operated quite differently from the public rhetoric that underpinned their wide-ranging authority.

An additional major critique of modern regulatory government targeted one of its greatest purported strengths—the capacity to tailor policy to the particular circumstances of different communities and firms and to adjust regulatory rules and requirements in the face of changing circumstances and new information. For many observers of the regulatory state, like the early twentieth-century economist John Maurice Clark, regulators frequently proved unable to live up to this high standard. Clark voiced this concern in a 1913 essay, “Frontiers of Regulation and What Lies Beyond” (Chapter 55). Writing amid waxing confidence in expert regulation, he raised a series of questions about the viability of extending price regulation, increasingly the norm for American transportation and utility companies, to large-scale manufacturing corporations, as a means to alleviate the effective “exertion” of consumers. Clark expressed great pessimism about any such endeavor, partly because of the enormous practical difficulties that had characterized the rate-making activities of railroad commissions. More importantly, he did not see how any industrial commission could cope with the rapid pace of technological innovation in manufacturing, nor the extraordinary range of quality in consumer goods. The former would quickly render any administrative evaluation of cost baselines obsolete; the latter generated a dizzying variety of prices that would overwhelm the capacities of even the most expert of regulatory agencies. Should the scope of price regulation reach large-scale manufacturers, regulators would lose crucial analytical yardsticks, since they would no longer be able to ascertain “reasonable” earnings through comparisons to the performance of unregulated firms. Competitive markets, Clark emphasized did a much, much better job of adjusting values than any battery of experts could manage. And regulation to restore competition would almost certainly protect consumers more effectively than efforts to control prices.

Writing some four decades later, the political scientist Marvin Harris gave Clark’s indictment a historical gloss in his 1955 monograph, Regulating Business by Independent Commission. In this influential volume, Bernstein introduced the idea of an institutional life cycle to depict what he characterized as commonplace bureaucratic decline. The officials at American independent regulatory agencies, Bernstein argued, often initially possessed a strong sense of mission, resulting from the political circumstances that led to their creation. But over the decades, the pressures of bureaucracy tended to make regulators hide-bound, slow to respond to changing economic or technological realities, and more solicitous of regulated businesses. Institutional independence, the political scientist cautioned, did not remove politics from regulatory policy-making. Instead, it pushed it into the shadows, as agencies tacitly fought to secure their jurisdictional turf. For Bernstein, and many social scientists influenced by his research, the regulatory record required a tempering of faith in the omniscience of technocratic regulation. A contemporaneous essay by the political scientist Samuel P. Huntington, “The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest” (Chapter 56), pursues many of these ideas in a closer analysis of the shifting priorities and capacities of the Interstate Commerce Commission.

Over the first century of experience with modern regulatory institutions, critics refined and sharpened assessments of their shortcomings, aided by the growing academic literature that examined its practical operations and consequences (a few examples of that literature will appear in Volume III). Many conservative economists, such as Milton Friedman and Ronald Coase, extended the arguments that regulatory institutions would impose unacceptable constraints on entrepreneurial freedom, prove slow to adapt to changing circumstances, and usually distort the more efficient mechanisms of markets. In his 1962 best seller, Capitalism and Freedom, Friedman popularized and updated the depiction of vigorous regulatory action as intrusive and counterproductive. Friedman echoed Hayek’s willingness to tolerate some regulatory roles for government, emphasizing the salience of monetary policy as a means to moderate the business cycle. But he amplified the Austrian school’s negative evaluation of efforts to moderate the prices set by monopolies and characterized regulatory limitations on entry into particular markets as deeply at odds with ideals of economic liberty. Coase trained
his rights on what he termed "the problem of social costs"—these negative externalities associated with economic activity, whether through damaging side effects to neighbors (pollution), or the broader public (as through the excessive exploitation of resource commons). He insisted that the most efficient way to handle such problems was through a clear delineation of property rights by courts in nuisance and tort cases. Compared to complex regulatory schemes, Coase maintained, judicial specification of property rights would facilitate a far more efficient process of contractual bargaining between economic producers and the communities that suffered losses as a result of their operations.

Even in the short to medium term, these broadsides had some policy impact. Especially in the early twentieth-century United States, appeals to economic freedom forestalled pressures for expansion of the regulatory state. From the 1920s through the 1940s, complaints about violations of legal norms about procedural fairness, alongside worries about insufficient opportunity for democratic participation, led to significant adjustments of regulatory administration. Such critiques resonated not only with many small businesses, but also with influential legal thinkers, a significant proportion of the legal profession, and the many lawyers who served as legislators. Their concerns about regulatory threats to the rule of law prompted numerous agencies, such as the Federal Trade Commission, to make their internal processes more law-like. Anxieties about regulatory process eventually led to the 1946 congressional enactment of the Administrative Procedure Act (APA), which soon spawned similar legislation by state legislatures. The APA required agencies to institute formal notice and comment rulemaking, in which the public received notice about potential regulatory standard-setting and the chance to submit evaluations of proposals, which agencies had to consider before settling on final rules. The legislation additionally required regulatory enforcement hearings to adopt numerous formal legal protections, including proper notice to defendants, access to relevant evidence, the separation of evidence-gathering and prosecutorial functions, and the provision of an internal appeals process.

The more formal procedural requirements mandated by the APA in turn generated new complaints about innumerable delays in regulatory decision-making, from both American businesses and many public interest groups. Green and Nader's essay in Part V voiced such exasperation, as well as a common demand for legislative innovations to force regulators to act more expeditiously. The American Congress increasingly heeded such calls by adopting explicit time limits for agencies to finalize specific regulatory rules. In combination with the expansion by the courts of legal standing to public interest groups (see below), regulatory deadlines gave third parties a means of holding agencies' feet to the fire through litigation.

The Evolving Regulatory State

Volume I puts forward an explicit historical periodization, identifying the century after 1870 as an era during which officials in Europe and then especially the United States forged a distinctive regulatory style, and institutional mode of regulatory governance. One can usefully think of this period as a working out of the basic institutional framework depicted in Figure 1 and then the diffusion of that framework across jurisdictions and an ever wider set of issue domains. Some readers, however, may find the volume somewhat teleological, since it is organized around the elaboration of abiding philosophical policy rationales, enduring approaches to institutional design and strategy, recurring policy instruments, and persistent intellectual objections. Some notable strategic inflection points nonetheless occurred during these decades, beyond procedural adjustments that sought to accommodate concerns about excessive discretion and administrative discretion. Those transformations also deserve some attention.

The concept of a "regulatory regime" offers a useful rubric for making sense of the more significant changes in regulatory institutions between the last quarter of the nineteenth century and roughly 1975. The political scientist MarcS. Einser has defined this term as "a historically specific configuration of policies and institutions which structures the relationship between social interests, the state, and economic actors in multiple sectors of the economy." Discrete regulatory regimes possess relatively cohesive goals, reflect the priorities of identifiable political coalitions, and embrace overarching administrative reforms.

Einser has applied this framework to American regulatory history, distinguishing three distinct regimes within the century covered by Volume I. He designates the roughly four decades after 1880 as a "Market Regime," characterized chiefly by regulatory responses to the challenges of natural monopolies, an integrated continental market, and industrial trusts. Outside of the halls of government, collective efforts to bring regulatory order to the economy mostly centered on industry-wide associations, which often ran afoul of antitrust enforcement. Inside those halls, whether on the local, state, or national level, newly created regulatory authorities tended to have authority over specific industries and focused especially on means to keep large-scale corporations from abusing their economic power. (The writings by Charles Francis Adams, Hadley, Henry C. Adams, Insull, Brandeis, Raus, Goodrich, Dunn, and Tugwell particularly reflect this approach.)

From World War I through the 1930s, Einser describes an alternative "Associational Regime." Regulatory institutions, whether dating from before or after the Great War, remained preoccupied by questions of market structure and pricing power, a broad terrain that many scholars refer to as "economic regulation." But regulators worried more about systemic, economy-wide stability (especially after the worst years of the Depression), and far more directly incorporated businesses and unions into "quasi-corporatist arrangements" that sought to create a degree of balance among countervailing economic interests. Many of these arrangements, as in the case of grain grading, insurance premium setting, and securities regulation, built on older and sometimes decades-long experiments with business self-regulation, but now included formal mechanisms of oversight by public regulatory institutions. (Relevant selections here include those by Graves, Riegel, Ripley, Nugent, and Henderson, Hudson, Benedict, Fox, Landis, Gordon, Glueck, Leiberson, Galbraith, and Arnold.)

During the three decades after World War II, and especially during the 1960s and 1970s, Einser describes a "Policy Regime." In this period of great prosperity and great technical advances in science, regulatory policies concentrated on "prevention of hazards to health and environment that occur in advanced industrial production." In the United States (as well as other industrialized democracies), new regulatory agencies mushroomed, often with authority that extended across the entire economy, such as the National Highway Traffic Safety Administration, the Environmental Protection Agency (EPA), and the Occupational Health and Safety Administration. These agencies promulgated wide-ranging rules for business operations based on extensive technical analysis, which frequently mandated significant adjustments to workplace design, manufacturing techniques, and/or business practices. (The essays by Ralph Smith and David Goodman exemplify these tendencies.)
One needs to be cognizant that such long-term periodizations (whether that of a century-long period of invention of the modern regulatory state, or the definition of important turning points within that century) inevitably involve a degree of fuzziness. As the selections for Volume I make clear, worries about environmental protection, public health, and ill-treatment of workers extended well back into the nineteenth century; as did attempts to address them through administrative agencies that possessed the power to make and enforce rules. As I have already noted with respect to public health, the European creation of relatively autonomous regulatory bureaus premised on scientific expertise reached back well before 1870. Even in the United States, one can point to policy contests that embraced key elements of modern regulation by the 1840s, such as federal safety regulation of steamboat boilers. By the same token, the regulation of prices/quotas and business entry in specific industries remained significant features of the American regulatory landscape for several decades after World War II; and as we shall see, these domains of regulatory policy-making have in many parts of the world become more important over the last three decades. Eisner’s distinctions still provide very useful guideposts for the dominant modes of American regulatory action during the century-long invention of the regulatory state.

**Volume II: Regulatory Reform amid a Newly Global World**

The second volume of this Research Collection engages with the dynamic processes of institutional change that have been regulatory governance during the last forty years. By the 1970s, discontent with regulatory institutions, strategies, and instruments reached something of a crescendo in the United States and Great Britain. Two energy crises, severe economic downturns, and persistent inflation all magnified the shortcomings of longstanding approaches to regulatory policy. At the same time, technological developments in industries like telecommunications undermined the rationale for restricting competition from new entrants. An emerging consensus among academics, many business leaders, and a coalition of elected officials across the political spectrum eventually encouraged more thorough-going redirection of regulatory policies and practices. As Volume II discusses at some length, post-1975 reform would be powerfully influenced by geopolitical currents and the early phases of the most recent period of economic globalization (a return to relatively open borders for goods and capital that characterized the four decades preceding World War I). But they would also be greatly shaped by the intellectual inclinations of expert, regulatory administration that had emerged over the preceding decades. The critique of modern regulation, moreover, would cast a long shadow, reaching far beyond America and Britain, to the rest of Europe and the wider world.

Much of the resulting reform focused on taming the regulatory Leviathan that had emerged over the preceding century, with the United States often in the vanguard. The post-1975 efforts to curb regulatory authority took so many forms and so frequently constrained the exercise of state power that it is tempting to label these decades as the Era of Deregulation. But one must remain cognizant of counter-movements that complicate matters. Over the past four decades, some important policy domains proved largely resistant to deregulatory pressures. In many contexts, the perceived consequences of deregulation prompted the re-imposition of regulatory authority. As the opening section of Volume II emphasizes, the growth of globalization, which did so much to encourage deregulatory policies, itself depended on a new international regulatory regime.

**Part I: The Regulatory Basis of Post-World War II Continental and Global Integration**

Just as the late nineteenth-century emergence of an effective national market in the United States depended on favorable regulatory rules, so too have more recent processes of economic integration rested on regulatory foundations. The vision of post-World War II free trade sketched by economists such as F. F. Eliot required the fashioning of new international institutions that would clear away national encumbrances to flows of capital, goods, and services. As in that earlier American process of integration, free trade platforms involved a mix of architectural designs – reduction of tariffs, constraints on non-tariff trade barriers, and harmonization of national standards and rules. The most important mechanisms for carrying out these policies were international trade processes, such as the General Agreement on Tariffs and Trade (GATT), which eventually led to the creation of the World Trade Organization (WTO). But bilateral trade treaties and multi-lateral regional trade agreements such as the North American Free Trade Agreement (NAFTA) also mattered, as did the identification and dissemination of best trade practices by such organizations as the International Monetary Fund (IMF), the World Bank, and the Organization for Economic Co-operation and Development (OECD).

The first part of Volume II starts with two especially incisive essays from a sizeable scholarly literature that considers the regulatory underpinnings of late twentieth-century globalization. The sociologists Neil Fligstein and Alec Stone Sweet examine the creation of the European Union – in many ways a contingent precursor to GATT and the WTO – in their 2002 article, “Constructing Policies and Markets: An Institutionalist Account of European Integration” (Chapter 1). As Fligstein and Sweet note, the creation of the European Economic Community (EEC) was motivated largely by the desire to blunt geopolitical conflicts that had stoked European wars for centuries. Post-World War II policy-makers viewed economic cooperation as a means to build a more durable peace. Drawing on social science scholarship about how legal frameworks and norms constitute markets, the authors show how the emergence of an identifiable European economy required far-reaching exercise of regulatory power. New European institutions, chiefly the European Court of Justice (ECJ), pursued a policy of “negative” integration in the 1970s and 1980s, disallowing national regulations that purported to have some other purpose, but that functioned primarily to protect local producers against foreign competitors. More recently, after the adoption of the Single European Act in 1986, which ended the requirement of unanimity in the European Parliament (EP), the EEC (and then the post-Treaty of Maastricht European Union) pursued policies of “positive” integration, harmonizing a host of standards and regulations across its member states. These processes occurred because of a “symbiotic relationship” between the EEC’s institutions and economic interests, chiefly large corporations, which created policy “feedback loops.” As EEC officials prodded national policy-makers and firms to envisage continental markets, and as cross-border trade became a more central feature of European economic life, large corporations increasingly challenged trade barriers before the ECJ and lobbied for continent-wide regulatory policies.

At the international level, positive integration, in the sense used by Fligstein and Sweet, often turns on mechanisms of transnational private regulation, particularly with regard to
technical standards that structure manufacturing and accounting. The 2010 essay by the political scientists Tim Bütte and Walter Mattli, "Standards for Global Markets: D匡namic and International Institutions" (Chapter 2), surveys this important regulatory facet of globalization. Bütte and Mattli explain the systemic advantages of clearly articulated product standards, including network effects within production chains and greater confidence on the part of potential consumers, and document the way that choices in standard-setting can confer both gains and losses on particular producers. They emphasize that privately determined technical standards have been vastly more important in the last two decades, since the WTO mandated that domestic regulations reference "international standards wherever possible" as the technical basis of laws and regulations that affect market access. Most importantly, they tease out the complex political dynamics that influence the sequential multi-stage process of technical standard-setting in international institutions such as the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). These processes greatly favor highly organized national and continental standard-setting bodies that possess expertise, sufficient resources to monitor the business of standard-setting closely, and sufficient internal consensus to speak with a single forceful voice. 

As a succession of international trade negotiations deepened the regulatory frameworks supporting economic globalization from the 1990s onwards, international trade mushroomed, roughly quintupling in value between 1990 and the onset of economic crisis in 2008. During these decades, the geographic distribution of manufacturing and many service industries became vastly more complicated. Taking advantage not only of more open markets but also dramatically reduced transportation costs and greatly improved communications, MNCs outsourced their operations and developed even more complex supply chains that might incorporate scores of firms in dozens of countries. In this more fluid environment, large-scale firms increasingly demonstrated a willingness to reduce their costs by moving their factories and service centers, or, if they had already achieved an integrated production for contractual relationships with external suppliers, to seek out new partners in less costly locales. 

The specter of "regulatory arbitrage" hung over this brave new global economy, just as it did in the United States during the late nineteenth and early twentieth centuries. Then, firms confronting proposals for exacting state-level regulations in some arena, such as the hours of labor, or the rules related to corporate governance, or prohibitions on the use of phosphorus in matches, could threaten to move to a state with preferable regulatory requirements. Businesses might fend off regulatory proposals by stressing that firms in other states would gain competitive advantages over them, or respond to the adoption of these proposals by actually moving (Henry Seager's 1912 essay in Volume I stressed the significance of this dynamic). Now, multi-national could similarly play entire countries off one another, potentially leading to analogous regulatory "races to the bottom," as governments in developing economies fought to attract the business investments that would bring employment, or as nations with financial centers vied with one another to attract transactions to their exchanges. A number of social scientists, joined by many anti-globalization activists, responded to the trade deals of the 1990s and 2000s by raising these possibilities. 

And in some economic sectors, globalization has had precisely this sort of impact, perhaps nowhere more tragically than in the massive growth of textile and clothing manufacturing in South Asia. Since 2005, the absence of basic workplace safety regulations has led to a string of factory fires and collapses in Bangladesh and Pakistan that killed or injured thousands of workers. 

In the last 40 years, however, regulatory competition among nation-states for global investment has not invariably eroded health, safety, or environmental protections, or prompted weaker rules in other regulatory domains. In some contexts, global competition has actually fostered adoption of more ambitious and stringent regulatory policies. This diversity of outcomes has been described by one prominent political scientist as "The Puzzle of Regulatory Competition." The next two essays grapple with dimensions of this puzzle. 

In a 1994 article, "The Dynamics of Financial Globalization: Technology, Market Structure, and Policy Response" (Chapter 3), the political scientist Philip Cerny makes the case for the overriding significance of regulatory arbitrage, at least with regard to macro-prudential regulation of finance. Cerny portrayed financial globalization as proceeding from the imposition of new international rules of the financial road than by technological innovations in computer processing and communications, along with the development of novel techniques of securitization. These transformations enabled the largest banks and hedge funds to slip the nooses of national regulatory frameworks, directing ever more complex transactions through ever-flung financial platforms. Such conditions created daunting obstacles to the formulation of regulatory policies that sought to tamp down volatility. National regulators, he predicted, would confront strong pressures to reject regulatory proposals that interfered with the ever-increasing torrent of financial flows, out of fear that they would simply push firms to base their operations elsewhere. Indeed, officials would most likely adopt rules that accommodated the ever more rapid turnover of securitized capital. From the perspective of a post-2008 world, this viewpoint comes across as notably prescient. 

The last two essays adopt a less pessimistic view about regulatory dynamics amid increasingly global marketplaces. Steven Vogel's 1997 article, "International Games with National Rules: How Regulation Shapes Competition in 'Global' Markets" (Chapter 4), also examines the impact of globalization on regulation within two sectors that led post-1975 global economic integration - the world of finance that drew Cerny's attention and telecommunications. Also a political scientist, Vogel compares developments in Britain and Japan, showing that at least in those industrialized societies, regulatory policy defied easy generalizations. The relevant regulatory debates involved cross-cutting regulatory goals, numerous constituencies within and outside the business community, and myriad policy issues addressed by multiple institutions. In such complex regulatory fields, Vogel argued, policy-makers and interest groups struggled to develop fully coherent regulatory agendas at either the national or international levels, even as regulatory issues demanded constant attention and regulatory decision-making compelled ongoing strategic adjustments. 

In their 1999 essay, "Ratcheting Up and Driving Down Global Regulatory Standards" (Chapter 5), the sociologists John Braithwaite and the legal scholar Peter Drahos take an even wider view of how globalization has shaped international regulatory dynamics. Drawing on the extensive base of research for their 2000 book, *Globa Business Regulation*, Braithwaite and Drahos identified two contrasting tendencies in world-wide regulatory policy-making, whether undertaken by governments or non-governmental standard-setting entities. Across the globe, they maintained, regulatory constraints on capital flows and corporate governance had loosened markedly - here they largely agreed with Cerny. But businesses, on the whole, also confronted more rigorous standards and tougher oversight in the regulation of safety and the environment, as well as for more substantial enforcement of intellectual property rights. They attributed these outcomes to several interrelated factors: the political impact of disasters and
crises; strategic splits within the global business community on many regulatory issues; and, most importantly, the capacity of savvy NGOs to build coalitions with business interests supporting tougher regulatory protections and to focus enforcement strategies on non-governmental gatekeepers, such as insurance companies, which often could more effectively compel adherence to regulatory standards. One can see many of these same dynamics now at work in Bangladesh, as the recent instance of many workplace deaths have generated searching examination of regulatory policies within both countries and through various international forums. Thus any firm conclusion about whether globalization fosters regulatory arbitrage requires close attention to differences among issue areas, as well as the possibility of policy reversals.

Part II: Post-1975 Regulatory Reform: Privatization, Deregulation, Delegation

Like most ambitious reform agendas, the impulse to foster economic globalization through new frameworks for international trade regulation had multiple origins. Many officials of national governments, including both industrialized and developing economies, saw trade liberalization as a key driver of domestic growth. As in the debates over the creation of a continental European economy, large corporations tended to view the renewal of global trade barriers as very much in their interest. Underlying these perspectives was an economic philosophy that valorized the workings of markets as a means of generating widely shared prosperity and that also had underpinned skepticism about the modern regulatory state since its inception in the late nineteenth century. Driving this forward was an elite social movement. This broad coalition consisted primarily of managers at MNCs, business-affiliated NGOs, politicians and bureaucrats, financiers and financiers, who furnished services to MNCs, and a phalanx of economists and other social scientists. It eventually drew its members from across the political spectrum, a development encapsulated in the emergence of a popular label to describe it—the "Washington Consensus." But it shaded significantly toward the political right, especially before the 1990s, and picked up momentum as a result of the economic stagnation of the 1970s in North America and Europe, which helped to propel conservatives to power in both Great Britain and the United States.

The political and policy shifts heralded by the electoral victories of Margaret Thatcher and Ronald Reagan (and in many ways propelled by Jimmy Carter’s policy inclinations) had profound implications for regulatory policy that reached far beyond the construction of more substantial international institutions devoted to free global trade. The electoral pivots of the late 1970s and early 1980s either accelerated or unleashed important reconfigurations of regulatory policy-making. The remainder of Volume II explores the multi-faceted array of regulatory reforms that scholars have proposed and many governments have adopted since then. Part II examines three respects of reform that each came into focus by the early 1990s: the impact of privatization; efforts to dismantle industry specific regulatory structures over price and entry, especially in the United States; and delegation of regulatory responsibilities to non-state actors.

Thatcher’s Conservative government pursued a wide-ranging policy of privatization, selling off state-owned utilities and providers of communication and transport such as British Gas, British Telecom, and British Rail. Over the next thirty years, scores of national, regional, and municipal governments emulated this rejection of state ownership. Initially these divestitures occurred primarily in Europe and North America. But as a result of lending requirements imposed by the IMF, best practices identified by the World Bank, and the culture of policy fashion, privatization increasingly became common in emerging economies as well. Yet as the political scientist Giandomenico Majone observes in his 1994 article, "The Rise of the Regulatory State in Europe” (Chapter 5), this process ironically encouraged the construction of numerous new regulatory bodies. In the aftermath of specific privatizations, Majone demonstrates, Europeans quickly recognized the potential for abuses by privately held corporations and sought regulatory means to restrain monopoly pricing and ensure broad access to services of acceptable quality. This pattern has continued to be reenacted since 1994, leading to the creation of hundreds of regulatory agencies both in Europe and every other part of the world.

Privatization also occurred in the United States. But because public ownership of basic economic infrastructure was far less common there, it tended to involve the outsourcing of services like prisons or garbage collection, or the creation of less heavily regulated charter schools. A more important reform impulse in America was the dismantling of industry-specific pricing and entry regulation, which, its advocates maintained, would reduce the strong inflationary pressures of the 1970s and foster technological and organizational innovation. American deregulation got underway even before the Reagan Revolution, partly as a response to disruptive technologies or business practices that undermined longstanding regulatory assumptions. At the national level, it was most powerfully affected the airline, railroad, and trucking industries during the Carter Administration, before later reshaping key features of banking, telecommunications, and energy markets. In some cases, deregulation entailed the wholesale destruction of venerable agencies, such as the Civil Aeronautics Board and the Interstate Commerce Commission. More frequently, it turned on the repeal of rules about licensing, entry, or regulatory determinations of pricing. Alongside the formal statutory repeal of regulatory authority in these sectors, some advocates of deregulation further sought to fetter regulatory agencies through more indirect means, such as appointing business leaders who opposed aggressive oversight to head regulatory agencies and trimming those agencies through budget cuts. Another channel, pursued by every presidential administration since Ford, has been to require agencies to reexamine the rules on the books, removing regulations that have proved ineffective or no longer serve their original purpose.

The following selection, Alfred Kahn’s 1979 address, “Applications of Economics to an Imperfect World” (Chapter 7), consciously lays out the rationale for price and entry deregulation in infrastructural industries. A Cornell University economist for much of his career, Kahn became a leading implementer of deregulatory policies in the 1970s, first as head of the New York State Public Service Commission, and then as chair of the Civil Aeronautics Board during the Carter Administration. In this lecture to the annual meeting of the American Economics Association, he explained the relevance of marginal cost pricing for efficient outcomes in a vast array of infrastructure industries. He also detailed various policy dilemmas created by piecemeal efforts to deregulate these industries, which intensified the political and organizational opposition to shaking up the regulatory status quo. Speaking before a sympathetic audience of academics, Kahn felt free to communicate his impatience with the practical barriers to more rapid regulatory reform.

The sociologist Robert Howitz’s 1986 essay, “Understanding Deregulation” (Chapter 8), furnishes an astute early reflection on America’s deregulatory era, pinpointing both the central
importance of ideas in generating the push for deregulation and a fundamental “paradox” about its extent and limits. Howitz offered the key insight that intellectual support for removing price supports in basic infrastructural industries ranged from Chicago-school economists to the New Left activists such as Ralph Nader (with a key figure such as Alfred Kahn lying in the middle of this ideological spectrum). He also grasped that deregulation occurred most dramatically in policy contexts where dominant economic interests least demanded it—the biggest firms and unions in heavily regulated industries like air travel and trucking often preferred the stable profits that accompanied regulatory arrangements. By contrast, the most far-reaching deregulatory proposals had made far less headway in the arenas that organized business cared most about—economy-wide protections for health, safety, the environment, and consumer fairness that supposedly had driven up corporate costs. In broad terms, this duality has continued to characterize American regulatory policy in the subsequent quarter-century.57

Nonetheless, the inclination to constrain the regulatory juggernaut found expression through other important policy adjustments. An increasingly more common option since the late 1970s has been to delegate regulatory authority to non-governmental entities. As we have seen, forms of business self-regulation emerged in tandem with the modern regulatory state, especially in industry-specific efforts to stabilize prices through cartel-like arrangements. One can also point to policy arenas such as factory smoke pollution and false advertising, where self-regulatory schemes gained traction in the late nineteenth or early twentieth centuries, or such as accreditation of educational and healthcare institutions, where they did so in the mid-twentieth century. After 1975, though, reliance on self-regulation grew appreciably, whether through NGOs affiliated with trade associations or corporations themselves. Self-regulation has occurred all across the globe, in regulatory contexts that range from nuclear power and chemical plant safety, to financial risk management, and food safety, to certification of organic agriculture and sustainable forestry practices, to adherence by global supply chain vendors to labor and environmental standards. Three pieces of scholarship convey the central ideas associated with this style of regulatory governance.

Wolfgang Streeck and Philippe Schnitter’s 1985 article, “Community, Market, State—and Associations? The Prospective Contribution of Interest Governance to Social Order” (Chapter 9), puts forward many of the leading rationales for business self-regulation by industry associations. The European authors, one a sociologist and the other a political scientist, begin by identifying mechanisms of associative self-governance as alternative modes of social ordering to the more familiar “community,” “market,” and “state.” They then sketch the longstanding hostility that associative approaches have elicited, either as threats to communal cohesion, vehicles of cartel-like rent-seeking, or encroachments on broader democratic processes. Self-regulation, they nonetheless contend, possesses important advantages. Noting its roots in European ideas about social solidarity and European guild practices, they highlight self-regulation’s capacity to foster norms that checked opportunism, coordinate behavior, and generate consent. Reliance on self-regulation meant far less substantial burden on the public purse. It often could draw on diligent follow-through, since industry leaders often wished to forestall more intrusive public regulation, and ensured better access to the detailed information that facilitated effective regulatory implementation and enforcement. In an age of heightened suspicion toward hierarchical state controls in matters of business regulation, these arguments carried weight in policy deliberations.

The book chapter by the political scientists Cary Cogliano and David Lazer, “Management-Based Regulatory Strategies” (Chapter 10), furnishes a companion investigation of an increasingly common version of regulated self-regulation, in which corporations took on responsibility for assessing specified operational risks, developing internal risk management plans and then reporting on those plans and their effectiveness to state regulators. This approach, Cogliano and Lazer maintain, makes sense when regulatory performance is difficult for external regulators to measure and regulated businesses are quite diverse, complicating efforts to define universal standards. They explore its potential through a case study of “the Hazards Analysis and Critical Control Points” protocol, a form of management regulation for food safety.60

The third contribution on self-regulation was written in 1999 by the political scientist and Nobel Laureate Elinor Ostrom. In “Polycentricity, Complexity, and the Commons” (Chapter 11), Ostrom makes a complementary argument for the advantages of business self-regulation, at least with regard to cooperative modes of managing natural resource commons (timber, fisheries, etc.). This regulatory arena is characterized by considerable uncertainty, especially in the context of rapidly changing environmental or economic circumstances. Decentralized resource management by local producers increases the variety of regulatory choices about information provision, incentive structures, and procedural requirements, and so reduces the likelihood of general policy failure in a given resource region. But like Cogliano and Lazer, Ostrom underscores the importance of overlapping state regulatory authority, both to disseminate information about the effective and ineffective centers of self-regulatory rules and to step in with coercive regulatory authority in the case of near local policy failures.

One of the main advantages of business self-regulation was its purported capacity to elicit compliance from regulated businesses, since they would respond less antagonistically to oversight from regulators that they viewed as part of their own community. A related strategy, known as “responsive regulation,” sought to infuse flexibility into enforcement strategies by regulators, whether private or public. John Braithwaite and the legal scholar Ian Ayres furnished a rigorous intellectual rationale for this enforcement strategy in their 1992 book, Responsive Regulation: Transcending the Deregulation Debate.61 Braithwaite and Ayres encouraged regulatory agencies to assume good will on the part of regulated businesses until proven otherwise. Regulators should approach enforcement initially as a process of educating wayward firms about their responsibilities, and then only gradually move along an enforcement pyramid, reserving the most punitive sorts of disciplinary proceedings for companies that demonstrated contempt for regulatory requirements. (In essence, Braithwaite and Ayres offered a formal conceptual framework for strategies of enforcement long employed by at least some regulatory agencies.) The next selection, a 2011 essay by legal scholar Neil Gunningham, “Strategizing Compliance and Enforcement: Responsive Regulation and Beyond” (Chapter 12), describes the more recent evolution of ideas along these lines, including the integration of non-governmental actors into enforcement strategies.62

For many modern conservatives who recoiled at the cumbersome nature of administrative regulation, the traditional court system had long hearkened to a preferable means of redressing the social and economic harms caused by negative externalities such as pollution, exposure to toxic substances, or catastrophic accidents resulting from insufficient attention to safety. Tort-based lawsuits for damages, they argued, could both furnish retrospective justice, compensating the victims of such externalities for the damages they had suffered, and create incentives for
films to limit their potential liability by redesigning their operations so as to avoid the externality in the first place. This policy option skirted, or at least diminished, the need for expansive regulatory institutions, by delegating regulatory enforcement to private attorneys general. The 1984 article by the economist William Landes and the legal scholar Richard Posner, "The Policy of a Regulatory Regime for Catastrophic Personal Injuries" (Chapter 13), offers a formal economic model on behalf of this approach. It also emphasizes the importance of allowing mass action tort suits, which allowed a practical means of overcoming the difficulties that individual litigants would face in pursuing complex, lengthy, expensive, and sometimes uncertain legal proceedings to their conclusion.

As with proposals for economic deregulation, reliance on mass tort actions enjoyed support among liberals as well as conservatives and became a significant feature of American regulatory governance in the decades after 1975. Private tort lawyers brought large-scale civil lawsuits against numerous industries, including chemical manufacturers, nuclear power operators, and tobacco companies. This last effort proved especially consequential, partly because of strong evidence that industry leaders knew about the health implications of long-term tobacco use, partly because the tort actions were eventually joined by dozens of state attorneys general, who sued to recover the health costs incurred by state governments. To at least some extent, mass tort suits represented a reaction to more permissive administrative regulation, as individuals who viewed themselves as incurring a disproportionate share of the costs associated with industrial society looked for alternative means of redress. Yet this reaction eventually triggered still another regulatory reform effort—a movement among conservatives in the 1990s and 2000s to adopt legislation that would confine tort actions and the extent of damage awards.71


Landes and Posner structured their analysis around two fundamental insights with wider salience for the evolution of modern regulation—that much regulatory policy sought to cope with risks of one kind or another; and that economic incentives, such as those created by tort verities, could go a long way to addressing many regulatory problems. Part III focuses on aspects of late-twentieth-century regulatory reform that sought to refine assessments of risk, to improve processes of risk management, and to harness economic incentives to achieve regulatory objectives, especially related to environmental protection. Each of these developments represented additional dimensions of the post-1970s impulse to reduce regulatory burdens on business and improve the efficiency and efficacy of regulatory action.

During the postwar World War II era of "Societal Regulation," democratic governments in the industrialized world expended a mounting proportion of their resources on efforts to reduce long-term risks to their populations. In part, the expansion of risk regulation reflected the adoption of advanced technologies that created new kinds of risks to health or the environment. In part, that expansion resulted from new scientific findings (at least some of which were prompted by popular concerns and investigations by regulatory agencies) that identified new hazards and pointed toward means of reducing them. More intense attention to environmental and health risks also represented a recalibration of priorities in the context of general prosperity and much longer lifespans. Heightened social expectations may well have made those risks seem more problematic, while the era's typically strong public confidence in governance sustained political consensus to try to reduce those hazards.72

Before the 1980s, American regulatory agencies developed idiosyncratic approaches to risk analysis, with widely varying assumptions about how to estimate risks from activities that might not bring about actual harms for many years and how to evaluate the degree of uncertainty associated with such estimations. This heterogeneity selected the vagaries of congressional policy-making, as regulatory statutes emerged from different committees and through various episodes of compromise and horse-trading, which produced varied instructions about risk analysis.73

Intensified scrutiny of regulatory governance eventually encouraged the development of more systematic approaches to probabilistic risk assessment. Spearheaded by the National Research Council and a new Interagency Regulatory Liaison Group, this process resulted in formal guidelines for the identification of hazards, the measuring of hazard exposures, target populations, and the calculation of impacts from those exposures.74 Over the last 30 years, these standards have increasingly structured regulatory risk assessment.

Edwin Johnson's 1982 essay, "Risk Assessment in an Administrative Agency" (Chapter 14), superbly introduces this aspect of environmental, health, and safety regulation. Then the direct of the EPA's Office of Pesticides and Toxic Substances, Johnson articulated the EPA's statutory responsibilities for regulating these chemicals with various other contexts of risk regulation and offered a useful primer on the basic concepts of "hazard" and "exposure" and the various techniques that scientists at regulatory agencies had developed to extrapolate from toxicologic animal studies, which often were predicated on high doses of exposure, to plausible long-term impacts on humans. He then laid out the multi-stage institutional process for risk assessment of pesticides, from initial data collection and preliminary risk analysis, through internal agency debate, external reviews, and eventual policy formulation. This process demanded attention not only to scientific uncertainties, but also to the enormity variations in product use and the health implications for different populations. Inevitable dependence on multiple assumptions, Johnson concluded, meant that chemical risk assessment would usually be subject to vigorous debate.

The next selection, Nicholas Ashford's 1988 reflection on "Science and Values in Risk Regulatory Process" (Chapter 15), was written in the midst of the scientific community's efforts to identify best practices for assessing risks related to regulatory policy-making. Trained in chemistry, economics, and law, Ashford focused on the many roles that scientists had come to play in the regulatory process—employees of regulatory agencies, members of scientific advisory boards, independent researchers, and recipients of grant funding from parties with stake in regulatory outcomes, such as corporations and trade associations. But he concentrated on the professional obligations of scientists and engineers to provide accurate technical information, including their best judgments about where risk estimates fall on "a continuum of uncertainty." Scientists engaged in the regulatory process, Ashford emphasized, frequently confronted the dilemma of whether to accentuate the possibility that society might "regulate an activity which turns out not to be harmful," or rather the possibility that it might "fail to regulate an activity which turns out to be harmful." Such evaluations inescapably involve value judgments; and they might easily be swayed by conflicts of interest. In light of these realities, Ashford underscored the importance of wide-ranging input into scientific debates on risk assessment, with representation of all relevant disciplines, full disclosure of potential biases, and explicit articulation of the assumptions and values that structured analyses.
Concerns about regulatory overreach also prompted interest in research about the psychological dynamics of risk perception. The next selection, a 1982 article by the cognitive psychologists Baruch Fischhoff, Paul Slovic, and Sarah Lichtenstein (Chapter 16), explores differences and similarities between the risk perceptions of non-experts and experts. Drawing on extensive experimental findings, these psychologists cautioned that expressed risk perceptions by laypersons were subject to all manner of cognitive biases, such as framing effects in the manner of question wording and the emotional salience of a given risk. Laypersons tended to overstate risks when asked about events with unfamiliar characteristics that they did not understand, that received wide coverage in the media because of their dramatic nature, and that they did not believe they could control. Experts, by contrast, could draw on greater knowledge, but demonstrated the same sorts of cognitive tendencies when assessing risks outside their field of expertise. Policy-makers, the authors concluded, should remain cognizant that public sentiment might exaggerate risks because of “deep emotional investment,” and that even the most careful expert assessment remained subject to potentially fallible assumptions. For policy-makers and scholars who worried about the possibility that health and environmental regulation might impose unacceptable burdens, this psychological research signaled the need for caution in adopting additional rulemaking under conditions of uncertainty.78

As scientists, engineers, and social scientists wrestled with the best analytical approaches to risk regulation in the 1980s and 1990s, they came to distinguish more carefully between risk assessment and risk management. The latter required careful inquiry into the potential steps that governments might take in the hope of preventing, or at least mitigating, the risks associated with some activity. Policy-makers almost always faced a wide menu of possibilities to which would always involve direct economic costs and produce a range of collateral effects, which might be socially advantageous, worrisome, or a mix of the two. How should officials go about deciding whether to address some risk, and how to do so? Economists took the lead in developing a conceptual framework for evaluating proposed policy responses to identified risks, building on the longstanding techniques of rigorously comparing the costs and benefits of proposed large-scale public works projects, such as dams. The 1968 article by the economists Richard Zeckhauser and W. Kip Viscusi, “The Risk Management Dilemma” (Chapter 17), nicely illustrates the resulting intellectual tools of cost-benefit analysis (or, as these authors and many others prefer, benefit-cost analysis). Drawing on the findings of cognitive psychologists, Zeckhauser and Viscusi stressed that both risk assessment and risk management were complicated by the limits of scientific knowledge and the constraints of human cognition. The antidote by with sober, expert calculation of risk probabilities and the overall economic impacts of policy alternatives, including not only various regulatory options but also action. Such an approach, they argued, would block many well-intentioned but misguided regulatory actions, speed up the introduction of technological innovations, and prompt regulatory responses to some important risks, like “unheralded highway accidents,” that the public tended to ignore.6

This general approach elicited sharp opposition from many social scientists and public interest groups, some of whom viewed it as a cynical means of deflecting pressures for socially advantageous regulation. The next selection, “Pricing the Priceless: Cost–Benefit Analysis of Environmental Protection” (Chapter 18), written in 2002 by the legal scholars Frank Ackerman and Lisa Heinzerling, elucidates this critique. Ackerman and Heinzerling objected to the rigid requirement of calculating regulatory benefits (such as improved health, lives saved, or protection of environmental conditions) in monetary terms, so that they could be compared mathematically to the economic costs of regulatory compliance. This analytical framework, they argued, violated important social norms about the value of life, confused the preferences of consumers or workers with those of citizens, and short-changed consideration of the long term. It also in many cases lacked plausible modes of estimating monetary values of health impacts and so adopted essentially arbitrary procedures. The discord over cost-benefit analysis did not prevent the basic approach from steadily gaining purchase within public policy schools and regulatory institutions throughout the world, reflecting the waxing influence of economists on regulatory decision-making.77 But this debate has led many economists to rethink techniques of value estimation for risks.78

Economic analysis of risk regulation also encouraged officials to consider how they might design policies that created market incentives to address regulatory objectives, thereby increasing the efficiency of policy interventions. (This impulse represented an attempt to overcome the sort of regulatory inflexibility that John Maurice Clark had described as early as the 1910s.) One alternative that economists had pointed to at least since the work of Pigou was the imposition of taxes or fees on business activities that generated negative externalities. During the 1970s, economists worked out a companion policy framework for some enduring environmental challenges, which involved pairing overall limits on a particular pollutant with tradable regulatory permits. This approach, its advocates contended, would be more efficient than requirements that plants adopt the “best available technology” (BAT) to control emissions, which ignored variable costs in pollution reduction. By creating a market in pollution licenses, firms that could more easily reduce emissions would sell their permits to companies that could not so readily lower their pollution output, thereby achieving any given level of pollution reduction at the lowest overall cost. Two selections convey the intellectual basis for this policy, which has become known as cap and trade. The economist W. David Montgomery’s 1972 essay, “Markets in Licenses and Efficient Pollution Control Programs” (Chapter 19), furnishes an early formal model of this approach. A 1988 article by the legal scholars Bruce Ackerman and Richard Stewart, “Reforming Environmental Law: The Democratic Case for Market Incentives” (Chapter 20), elucidates the central idea behind the creation of pollution markets in more accessible prose. Centralized determinations of BAT for pollution control, Ackerman and Stewart contended, led to scientific muddles, endemic procedural delays, unfair distribution of costs, and obstacles to technological improvements, all problems that reliance on pollution markets could address.

Proposals for market-based anti-pollution schemes initially came under heavy fire from many scholars, politicians, and social activists, especially those who retained faith in public regulation and viewed corporations as often heedless of their impact on wider social interests. Indeed, Ackerman and Stewart structured their 1988 article as a response to one prominent legal critic. One especially contentious issue concerned “hotspots.” Local areas that suffered concentrated pollution effects under pollution trading regimes. But after a series of policy successes in the United States and Europe during the 1980s and early 1990s, cap and trade programs gained adherents from across the political spectrum and became a staple element of environmental regulation in industrialized economies, at every level of jurisdiction. As a result, this approach has become one of the most obvious instances of regulatory governance giving rise to and structuring new markets.79
Part IV: Post-1975 Regulation Reform: Mechanisms of Meta-Regulation

Arguably the most far-reaching reforms of regulatory governance since the early 1970s operated not through any specific regulatory agencies or issue areas, or through particular techniques of regulatory action, but rather through the introduction of new institutional checks and balances. Antagonism to intrusive and costly business regulation encouraged the elaboration of several new forms of higher level policy oversight; but so did perception that many agencies had become too solicitous of regulated industries, concerned about the implications of scientific uncertainty, and recognition of the sheer volume of an ever-expanding regulatory docket, which raised administrative concerns about priority setting and conflict resolution.

The legal system supplied one crucial avenue for enhanced regulatory oversight. As the earlier discussion of the Administrative Procedure Act observed, mid-twentieth-century statutory reforms greatly expanded the ability of affected parties to challenge American regulatory decision-making via lawsuits. Nonetheless, until roughly 1970, the American judiciary continued to demonstrate a basic deference to the fact-finding and policy determinations of ostensibly expert regulatory agencies. Beginning in the late 1960s, however, both liberal and conservative members of the federal bench adopted a far more critical stance toward regulatory action. Among some liberal judges, heightened concerns about agency capture prompted creative expansion of rules about standing, so that a wider array of interest groups could challenge regulatory agencies in court, as well as a willingness to order agencies to live up to their statutory responsibilities to issue regulatory rules. For a number of influential conservative judges, as well as some moderate jurists, diminished deference emanated from their engagement with an emerging law and economics movement, which increasingly shaped legal scholarship and educational trends from the mid-1970s onwards. Following the lead of corporate litigators, this segment of the judiciary often questioned the scientific basis for regulatory rule-making and demanded that agencies supply more detailed analysis of costs and benefits as justification for their decisions. But these judges also issued rulings that facilitated moves toward deregulation of pricing and entry in infrastructural industries. Robert Horwitz analyzes these cross-cutting developments in his 1994 article, "Judicial Review of Regulatory Decisions: The Changing Criterion" (Chapter 2). In more recent years, federal judges, especially on the D.C. Circuit, have extended their willingness to reconsider the substantive rationale underlying regulatory policies, such as in a 2010 Securities and Exchange Commission rule that gave investors limited authority to nominate corporate board members.

Through the 1990s, most comparative scholars of regulation viewed this type of searching judicial oversight of regulatory decision-making as distinctively American, diverging from the style of regulatory governance in Europe, where authorities preferred cooperative, informal regulatory arrangements among elites, which occurred without much transparency or legal challenge. The next selection, a 2006 article by the political scientist Daniel Kelemen, "Suing for Europe: Adversarial Legitimacy and European Governance" (Chapter 22), traces the growing tendency of European courts to undertake analogues review of regulation. Judicial muscle flexing, Kelemen argues, represents a central manifestation of European integration and liberalization. This process not only required EU courts to police national regulatory actions that created non-tariff trade barriers, it also led to an expansion of legal standing as a democratic counterweight to the centralization of European authority, which then generated regular challenges to regulatory processes and outcomes. As in the United States, a more adversarial legal culture sometimes foreclosed attempted regulation, sometimes compelled an end to regulatory foot-dragging, and generally encouraged a more time-consuming and contentious regulatory process.

A second and even more substantial form of regulatory oversight emerged through mechanisms of executive major administration. Once again, the US federal government took the lead. Beginning in the 1970s, a succession of presidents issued executive orders that required White House review of proposed major regulations—usually those that entailed estimated compliance costs to businesses over $100 million. Initially undertaken by the Council on Wage and Price Stability, from 1980 onwards these evaluations became the purview of the newly created Office of Information and Regulatory Affairs (OIRA), which became part of the President's Office of Management and Budget. Such reviews were supposed to reduce the incidence of conflicts between regulatory policies emerging from different agencies. In addition, they gave the White House staff a formal means of assessing the technical analysis underlying agency decisions to regulate and their choice of policy instruments. To facilitate OIRA reviews, executive orders eventually mandated formal administrative cost-benefit analysis of policy options, including attention to the collateral risks and harms caused by regulatory actions. Under President Reagan's executive order 12291, OIRA received authority to reject agency regulations when their estimated benefits did not exceed their costs. President Clinton subsequently loosened this standard, requiring that major regulations "justify" their costs.

The primary impetus for this new form of executive oversight rested with the stagnation of the 1970s. Facing high inflation, sluggish growth, and a chorus of complaints from businesses about the costs of regulatory compliance, the Carter and Reagan Administrations wanted to create a meaningful check on the imposition of new environmental, health, and safety rules. As with judicial oversight, though, executive regulatory reviews could demand more aggressive risk regulation as well as compel less stringent rules or block action altogether. Even the conservative George W. Bush Administration made a point of this latter exercise of regulatory oversight, with its OIRA staff, John Graham, creating a formal "prompt letter" as a means to nudge agencies to move on regulatory agendas. Figure 2 conveys the basic workings of White House meta-regulation. This form of oversight chiefly involves sustained assessment of the analytical basis of major regulatory proposals before they gain the force of law and often leads to revision of draft regulations. In recent years, however, there has also been a growing focus on retrospective reviews of existing regulations, indicated by the right part of the diagram. President Obama formalized this process with an executive order that compelled agencies to solicit suggestions from the public about regulations that might be outdated or ineffective in achieving their goals at acceptable costs and then to review the impacts of those rules. The resulting process has led to the elimination of scores of regulations across the federal government.

Formal structures of executive regulatory oversight, like the basic analytical tools of cost-benefit analysis, attracted political opposition and intellectual detractors. Nonetheless, it quickly spread from the United States to other jurisdictions, as administrations of varying political viewpoints saw advantages in imposing more substantial accountability on regulatory processes. The resulting institutional structures, however, came with distinctive variations in design. In the European Union, the major focus has been on sober second looks at proposed EU legislative proposals. Since 2002, the European Union has required "Regulatory Impact Assessments" (RIAs) of major legislative proposals, which then go before an impact
Assessment Board, which has not hesitated to exercise its power to demand revisions. Elsewhere, countries have adopted a mix of structures, some concentrating on legislation, others on administrative rule-making. The legal scholar Jonathan Wiener supplies an incisive overview of these institutional innovations in his 2013 essay, “The Diffusion of Regulatory Oversight” (Chapter 23).

Figure 3 supplies a conceptual overview of the various shifts in regulatory governance discussed in the preceding three parts of Volume II. As this schematic indicates, ambitious initiatives in environmental and health regulation, along with the economic stagnation of the 1970s, generated a more intense set of complaints about the regulatory state, amplified by a far more aggressive business lobby in North America and parts of Europe. These conditions, along with processes of globalization and the eventual fall of the Soviet Union, set the stage for deregulation, privatization, the creation of regulatory oversight bodies, and the reorientation of risk regulation toward market-based strategies and forms of business self-regulation. Almost immediately, however, these developments spawned counter-movements, including pressures to regulate privatized infrastructure industries in much of the world and attempts by environmental and labor NGOs to create new forms of international regulation through certification schemes for businesses operating in global markets.

Part V: Post-1975 Regulatory Reform: Rethinking Strategies of Institutional Design

The regulatory reforms from the 1980s and 1990s depicted in Figure 3 emerged predominantly from the political right and center. Primarily reflecting intellectual ferment from conservatives and moderates (Ralph Nader’s views on deregulation to the contrary notwithstanding), they presumed that economic decision-making chiefly represented rational calculations of self-interest. These reforms further posited that markets and properly structured economic incentives could usually achieve broad social aims, and they adopted an optimistic view about the capacity and willingness of firms to meet regulatory objectives when the state imposed them.

But the evident shortcomings of regulatory institutions and the economic challenges of the late twentieth century also motivated new thinking about regulatory governance from other political and intellectual vantage points. The final part of this volume presents leading examples of these alternative ideas for improving regulatory process and outcomes, many of which incorporated venerable concepts from the preceding century of experience with the modern regulatory state. Most of these writings date from after the onset of the Global Financial Crisis in 2007–08, which shook up ideas about the stability of markets and the nature of economic risks in an interconnected world. Several selections come from *New Perspectives on Regulation*, a 2009 collection of synthetic essays commissioned by The Tobin Project, a network of leading American social scientists that has sponsored several interdisciplinary inquiries into the sources of effective regulatory policy.

Part V leads off, however, with a more recent (though quite prescient) discussion of how to improve regulatory outcomes by deepening public participation in policy-making. Richard C. Leone’s 1972 essay, “Public Interest Advocacy and the Regulatory Process” (Chapter 24), supplies an early consideration of this theme, which foreshadows an array of important institutional innovations over the next four decades. Then a public policy scholar (he would go on to have a varied career in public service), Leone framed his essay around Ralph Nader’s example as a regulatory activist. Nader’s organization, Public Citizen, was not content just to
1970s

- Greater Environmental, Health, & Safety Regulation (US, Europe)
- Command & Control
- Delay & Uncertainty (More Litigation)
- Industry Capture: Economic Regulation
- Rigidity
- Costliness
- Early Phases of 2nd Period of Modern Globalization

1980s/1990s

- Less Stringent Regulation (US)
- Deregulation of Infrastructure Industries (US)
- Privatization of Infrastructure (Europe, Lat. Am., Asia)
- Meta-Regulation
  - > Market-Based Regulation (OECD Countries)
  - > Business Self-Regulation (OECD Countries)
- Regulatory Oversight Bodies (OECD, EU, IMF, ADB)
- International Trade Regime (GATT/WTO, IMF, WTO)
- Meta-Regulation
- Enforcement
- Agency Budget Cuts
- Softer Enforcement
- Acceleration of Globalization
- > NGO Certification Schemes for International Environmental & Labor Standards

2000s

- Regulation of Infrastructure Industries (Europe, Latin America, Asia, Africa)
- Decentralization
- Meta-Regulation

Figure 5: Overview of the Shifts in Regulatory Governance
investigate the operations of regulatory agencies and the impact of regulatory policies. It sought the widest publicity for its findings, which typically took agencies to task for bureaucratic tangles and excessive solicitorliness toward industry. And it aggressively pushed a regulatory policy agenda, including proposals for specific regulatory actions and broader institutional reforms and frequent legal action to challenge agency decisions or inaction. Leone's essay describes the structural impediments to representation of consumer interests before regulatory agencies, as well as the array of American NGOs and law firms that followed Nader's lead during the late 1960s and early 1970s, all intent on becoming watchdogs of the public interest, as they understood it. As Robert Horwitz notes in his essay, an judicial review of regulation, these groups tended to reject a model of regulation predicated on deference to technocratic mandates, preferring a policy process that sought adjustments to a plurality of views and interests.

Leone closed his essay by questioning whether public interest advocates would be able to find sufficient funding to sustain their activities over the long haul and become "institutionalized" within the regulatory process, or rather, in the end, constitute more of a political force. Certainly one of Nader's most ambitious proposals for reforming the American regulatory state, the creation of a Consumer Protection Agency, which could represent consumer interests in regulatory proceedings through the government, did not succeed, but by a sustained corporate lobbying campaign. Nonetheless, public interest groups have continued to present their perspectives and analyses in regulatory proceedings and, often serving as an effective counterweight to similar efforts by corporations and industry associations. The vision of incorporating interest groups into regulatory rule-making and enforcement processes, however, continues to influence the design of numerous regulatory institutions over the last four decades. John Braithwaite has used the term "triapartism" to describe this reliance on third-party groups, particularly with regard to the monitoring of regulatory compliance. Another selection in Volume III, Tim Bartley's essay on the regulatory activities of international environmental and labor NGOs, shows how interest groups have profoundly shaped the growth of institutions that attempt to regulate features of the global economy.

The next selection, Ravi Abdellal and John Ruggie's essay on "The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism" (Chapter 25), continues this engagement with the question of how to ensure that regulatory policy aligns with broad social interests. These two political scientists explicitly base their analysis on Karl Polanyi's insights about the political constraints on economic arrangements — that as the run-up to World War II demonstrated, policy frameworks that reinforced markets without sufficient attention to issues of distribution and legitimacy would eventually founder on the shoals of popular upheaval. Abdellal and Ruggie apply this perspective to the current dynamics of globalization, which have placed increasing power in the hands of transnational corporations and the largest international banks and limited the ability of national governments to offset social and economic risks. They call for revision of the international rules that govern flows of goods and capital, with more leeway for national governments to address "the adverse social impacts of corporate activities," greater emphasis on multi-lateralism in the forging of international trade rules, and heightened representation for emerging economies in international organizations. Without adjustments that would re-embed global markets in a web of regulatory checks and balances, Abdellal and Ruggie caution, the current phase of globalization could well face a tsunami of social protest.

In essence, Abdellal and Ruggie call for policy-makers to remain alert to the long-term political implications of global economic ecology. The 2010 article by the sociologists Marc Schneiberg and Tim Bartley, "Regulating or Redesigning Finance? Market Architectures, Normal Accidents, and Dilemmas of Regulatory Reform" (Chapter 26), is animated by a similar sensibility, but one focused on the most basic regulatory function of constituting markets. Schneiberg and Bartley approach the Global Financial Crisis as a case study in risks associated with complex, tightly coupled systems. Building on the work of sociologist Charles Perrow, they argue that the degree of complexity, interconnectedness, and leverage in the contemporary global financial system all but guarantees the onset of periodic crises, especially in light of the rapid pace of financial innovation, which mostly takes place in the shadow banking system, outside the line of sight of even the most vigilant financial regulators. Schneiberg and Bartley raise various alternatives for beefing up regulatory capacity and improving regulators' recognition of and adaptability to changing market circumstances. Their suggestions include a "prior approval" system for new financial products akin to that in place for new pharmaceuticals; clearer structures for resolving the failures of financial firms through bargaining mechanisms; and development of a more credible threat of nationalization in the event of a banking crisis, to foster more constructive negotiations over restructuring.

In light of the fragmentation and limited funding of financial regulators, however, Schneiberg and Bartley argue that the most effective means of constraining financial instability probably lies with efforts to reconstuct the organizational bases of the financial sector. They call for policy-makers to reintegrate the basic design of this pivotal industry. They then sketch various regulatory policies that would encourage a more diverse set of less complicated financial institutions, including some publicly owned, that would concentrate on the servicing of real transactions, without a fundamental reliance on securitization as a means of lowering capital requirements. This approach, they contend, would likely do a better job of increasing the robustness of the overall financial system.

The business economists Michael Porter and Claes van der Linde share this inclination to conceive of regulatory policy as an instrument to shape the economic terrain of particular sectors. Their interest, however, lies in the capacity of well-conceived environmental standards to generate technological breakthroughs. In their 1995 article, "Toward a New Conception of the Environment Competitiveness Relationship" (Chapter 27), Porter and van der Linde observe that sensitive environmental requirements "can trigger innovation that may partially or more than fully offset the costs of complying with them." They point to numerous examples in which new technologies or process reengineering that reduced pollution also improved productivity. As a result, they encouraged environmental regulators to identify contexts in which "organizational inertia" and a lack of access to information about emerging technologies held back corporate investment. Officials could then craft a mix of policies, including pollution disclosure requirements, dissemination of best practices, and even strict pollution limits, which sent unambiguous signals to manufacturers about the need and practicability of redesigning their products or operations. Although Porter and van der Linde argue their analysis is fairly recent regulatory examples, their basic intuitions have a longer pedigree. One can see similar dynamics at work in late nineteenth-century and early twentieth-century regulation of railroad safety. Porter and van der Linde, like many scholars who write about business regulation and public policy, presume that economic actors typically act on the basis of their self-interest, often
construed according to a fairly short time horizon. In his essay, "From Greenspan’s Despair to Obama’s Hope: The Scientific Bases of Cooperation as Principles of Regulation" (Chapter 28), the legal scholar Yochai Benkler takes issue with the universality of this assumption. He shows that research from many disciplines (cognitive psychology, cultural anthropology, behavioral economics, organizational sociology, neuroscience, and evolutionary biology) all point to the depth of social motivations for a significant proportion of human behavior. The architects of regulatory policy should accordingly grasp the basic dynamics of social cooperation, so that their institutional designs and choices of policy tools harness this basic human trait. For Benkler, the key to successful regulatory policy lies in finding the right balance between efforts to trigger cooperative rule-making and compliance strategies and reliance on coercive policy instruments to keep relatively selfish individuals and firms in line. The attainment of cooperation requires genuine dialogue, empathy, community framing, building of trust through transparency and reciprocity, and concern for equity and fairness in policy formulation. Constraining comparatively selfish actors, by contrast, typically involves credible extrinsic incentives for rule following—either subsidies or threats of punishment. This essay encourages regulators to imagine the potential for achieving regulatory objectives through social mechanisms as well as market mechanisms and to be aware that choosing market-based or highly coercive policy instruments often crowds out cooperative behavior through framing effects.

The following selection, written by the legal scholar Michael Barr, the economist Sundhil Mullainathan, and the cognitive psychologist Eldar Shafir, presents a complementary critique of regulatory policy based on the national actor model. In "The Case for Behaviorally Informed Regulation" (Chapter 29), these scholars catalogue findings from the burgeoning literature about psychological constraints on economic decision-making. Very few people, this research indicates, act with "perfect information and ... foresight." Even when economic actors do possess access to extensive data, their perceptions are powerfully shaped by how it is framed because of reliance on non-rational heuristics to make sense of a complex, information-laden world. Most consumers and investors have limited attention and shy away from a large array of confusing choices, giving great power to institutional default options. They often do a poor job of predicting their future preferences and seek to avoid "anticipated regret." As a result, Barr, Mullainathan, and Shafir insist, legislators and regulatory officials need to undertake cost-benefit analyses, design institutions, and craft policies that account for these psychological patterns and how they interact with incentives in given markets. Thus regulators might pay especially close attention to contexts in which firms have incentives to take advantage of "consumer fallibility," such as mortgage lending. And they might need to develop an integrated suite of regulations to address problems in such a regulatory area: requiring the disclosure of more information about loan terms, designing disclosure rules to increase the likelihood that consumers make good use of the information provided, imposing "stickier" legal defaults (that is, defaults that are harder to contract around) that protect consumer interests, and adjusting standards of liability to facilitate ex post legal challenges to allegedly deceptive marketing practices.

One can see precursors to this version of "behaviorally informed regulation" in the early twenty-first century discussions of consumer and investor protection, such as the writings by Theodore C. Klorer and Rolf Nygård and Leon Henderson. Like those earlier thinkers, and also many other contemporary behavioral economists, Barr, Mullainathan, and Shafir envisage regulatory authority as most appropriately empowering market participants to make sensible decisions. Tom Baker and David Moss's essay, "Government as Risk Manager" (Chapter 30), similarly retains a healthy respect for the power of capitalist markets to allocate resources efficiently. But Baker, a legal scholar, and Moss, a policy historian, also see a crucial public role for risk management.

Taking a long view of regulatory history, Baker and Moss chart the emergence of various regulatory strategies for reducing risks, either to particular social groups or the overall economy. The authors distinguish "risk prevention" (or "reduction"), the standard goal of most environmental, health, and safety regulations, from "risk shifting" (transferring responsibility for losses, as through liability defaults, to parties better able to absorb them), "risk spreading" (mechanisms of insurance), and "loss control" (efforts to mitigate damages to parties after they have occurred). The chapter also specifies a number of key historical lessons about effective execution of risk regulation. Policy-makers should place the burden for managing risk on those institutions best able to do so (a clear echo of Chadwick's 1881 advice about preventing industrial accidents) and avoid the creation of perverse incentives to take on risks (a similar refrain of Fox's 1936 reflection on deposit insurance). They should take care to provide sufficiently robust capital bases for social insurance mechanisms. Where appropriate, they should seek to "enhance" mechanisms of private risk management, rather than replace them with public alternatives. Depending on the capacity of consumers to make decent judgments about risks in a given market, this goal might call for adjusting the incentives to use private risk management products, improving the quality of information about them, or prohibiting especially risky offerings. Baker and Moss then apply these principles to a range of pressing policy issues, engaging directly with the challenge of matching appropriate regulatory strategies and policy tools to specific regulatory goals and the distinctive characteristics of different markets, businesses, products/services, and consumers/investors. As such, they implicitly build on the work of the legal scholar and Supreme Court Justice Stephen Breyer in his 1982 hook, Regulation and Its Reform, which explored several case studies of "mismatched" regulatory policies.

For the most part, scholars who manifest confidence in the ability of policy-makers to avoid such mismatches also remain aware that devising effective regulatory solutions can be difficult. The early twenty-first century global economy is founded on rapidly evolving technologies and financial instruments and operates through exceedingly complex networks. Regulators frequently must make decisions based on incomplete information, and they remain subject to the same bounded rationality as economic actors. Given these realities, some incidence of partial policy success and outright policy failure is inevitable. Recognition of the uncertainties surrounding well-intentioned regulatory policy-making has encouraged the articulation of an experimental policy mindset. This development echoes the early twentieth century's embrace of technocratic pragmatism, in which officials would try out some cluster of policies, assess their impacts, and revise or replace them accordingly. The final selection of Volume II, Charles Sabel and Jonathan Zeitlin's essay, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU" (Chapter 31), nicely illustrates this regulatory neo-pragmatism.

Sabel, a political scientist/legal scholar, and Zeitlin, a historian who has moved into public policy, examine the evolving structure of policy formulation, evaluation, and revision in the European Union. Between the mid-1980s and around 2000, in policy domains as various as telecommunications, pharmaceutical licensing, environmental protection, and food safety, the
European Union has fashioned a multi-level distribution of authority that treats nation-states as "laboratories of democracy." Individual countries retained considerable capacity to enact regulatory rules and often took divergent paths. But national authorities had to send detailed reports to the European Union on policy goals, methods, and outcomes. National representatives also took part in peer review of one another's policies. The resulting processes of comparison and evaluation, Sabel and Zeitlin argue, have greatly improved policy deliberations and increasingly fed back into regulatory modifications. In some cases the European Union created these networks of evaluation in response to "catastrophic breakdowns in regulatory capacity," revealed by specific crises. In others, the European Union did so as a condition of allowing national governments to regulate privatized infrastructure industries that had reorganized on continental lines. In still others, EU officials moved toward this model as a way to encourage consensus on contentious regulatory issues. The precise nature of peer networks and policy evaluation also vary greatly across issue areas. Nonetheless, Sabel and Zeitlin portray the European Union's sometimes jerrybuilt arrangements as a model for the design of more robust, adaptive regulatory institutions at the global level. In many ways this set of developments represents an additional form of meta-regulation, with a form of collaborative oversight provided by international networks of regulatory officials.

A growing body of literature is extending consideration of the prospects for and requirements of experimentalist regulation. Some of this research discusses how individual agencies might rigorously analyze "natural experiments" in regulation or roll out regulations on a trial basis in a limited area. Other scholars have begun a discussion about how to construct an organizational culture conducive to experimentalism, so that regulatory agencies not only invest resources in thorough and conscientious evaluation of policy outcomes, but also foster a genuine commitment to learning from these exercises and the experiences of their counterparts in other jurisdictions. This area is likely to prove a fertile terrain for future scholarship on regulatory governance.

A Regulatory Inflection Point?

Barely half a decade on from the Global Financial Crisis of 2007-08, it remains far too early for confident assessments of whether business regulation has recently undergone a truly epochal turning point that will lead scholars to identify entirely new regulatory regimes, in the sense used by Marc Fiessner. One can certainly point to developments that indicate substantial change, such as the creation of potentially powerful new regulatory agencies like the American Consumer Financial Protection Bureau, the establishment of new financial supervisory bodies in the European Union, and the imposition in many countries of more significant regulatory constraints on financial institutions. At the same time, however, several governments have delayed the implementation of new financial rules, and in both the United States and Europe, the financial community has continued to probe for means of diluting post-crisis regulatory standards. The budgetary constraints associated with post-crisis austerity, moreover, have significantly constrained the capacities of numerous regulatory agencies across the globe. Only more time will provide a clearer sense of how profoundly the financial meltdown has reshaped conventional wisdom and fostered new thinking about regulation - whether about issues of banking and finance, or the myriad other domains of regulatory policy-making. Nonetheless, the severity of the economic crisis does seem to have significantly altered regulatory debates within academia, corporate states, the offices of NGOs, and the halls of the

state. In both established industrial democracies and emerging economies, there does not seem to be quite the same reflexive rejection of state power, not quite the same faith in supposedly self-regulating markets, that characterized many policy discussions in the preceding quarter-century.

Volume III: Taking Stock of Modern Business Regulation: A Versatile Methodological Toolkit

Even though the disciplines of law and economics have provided especially significant intellectual foundations for modern regulatory institutions, the world of business regulation has elicited rich scholarship from every social science discipline. The final volume of this Research Collection presents a sampling of the methodological diversity in research on regulatory governance. Scholars, policy-makers, and frequent participants in the regulatory process would all benefit from a stronger appreciation of the strengths and blind spots of these different modes of empirical research, analysis, and interpretation.

There are, of course, many ways to study how regulatory institutions function. Four themes receive extensive coverage here:

- **modes of analyzing regulatory culture** - the norms, understandings, and commitments that intersect with incentives to shape the organizational life of regulatory agencies and the other entities (businesses, trade associations, and third-party groups) with which they deal;
- **strategies of societal comparison** - attempts to gain greater insight about the distinctiveness (or typicality) of regulatory goals, formal institutional design and policy tools, and informal enforcement postures and styles of governance;
- **methods of assessing the impacts of regulatory policies** - whether quantitative evaluations of prices, quality, output, and distributional implications, or qualitative evaluations of the consequences for business strategy, social norms, and political culture;
- **approaches to explaining regulatory change over time** - whether with respect to the most significant regulatory purposes in a given policy, the adoption/diffusion of new institutions or policy instruments, or the emergence of novel regulatory regimes.

The scholarly research that I have chosen as emblematic of these thematic approaches demonstrates strong commitments to empiricism - to the amassing of evidence about how regulatory institutions and policy actually work. These pieces of scholarship by no means reflexively reject theoretical frameworks. But their authors insist that theories about business regulation fit the relevant facts and that the relevant facts are not always easily expressed through quantification.

Part I: Business Regulation in Action: The Lens of Ethnography

The opening segment of Volume III addresses an under-utilized approach to studying business regulation: institutional ethnography. This approach shies away from making strong assumptions about the behavior of regulators or regulated entities, or constructing formal
models of regulatory decision-making. Instead, its practitioners immerse themselves in the detail-filled, day-to-day worlds of policy formulation and policy implementation, sometimes as participant observers (more common among sociologists and cultural anthropologists), sometimes through interviews and archival research (the preferred alternative for most historians and many political scientists). The intellectual goal here is a "thick description" of regulation in action, in the sense used by anthropologist Clifford Geertz. The best of these descriptions take account of incentives and power structures, but also show how they interact with organizational culture, social norms, and the strategic choices of key actors, whether within or outside the state.

Some of the writings by regulatory officials in volumes I and II (for example, Rosa, Arnold, Johnson, and Kahn) have an ethnographic dimension, as they included autobiographical reflections on quotidiant operations of regulatory agencies. The political scientist Keith Hawkins' 1984 essay, "Creating Cases in a Regulatory Agency" (Chapter 1), offers a more explicit analysis of how organizational culture and social context shape regulatory decision-making. Hawkins based this essay on an extensive observation of British water pollution control officers, the front-line monitors and enforcers of water quality on British rivers and streams. He explored the interaction of local knowledge and standards of fairness with statutory mandates and formal procedural rules, as water inspectors decided whether or not to open official pollution cases. Decision-making, he found, varied considerably with the environmental conditions and social uses of waterways, but also the reputation of firms that discharge effluent into streams and rivers, the credibility and political clout of individuals who lodge complaints, and the baseline perceptions of inspectors about typical water quality. Hawkins demonstrates that informal norms can profoundly shape enforcement. Water inspectors tended to ignore marginal instances of pollution because of the uncertainties surrounding chemical analysis of water samples; they shied away from citing industrial polluters who reported their own illegal but usual discharges; they directed scarce resources to the monitoring of repeat offenders; they responded especially vigorously to incidents that might occasion public notice and criticism.

The actual implementation of regulatory policy is always influenced by these sorts of considerations.

Two essays, John Braithwaite’s 1993 “Transnational Regulation of the Pharmaceutical Industry” (Chapter 2), and the 2011 book chapter by political scientists Robert Kagan, Neil Gunnigham, and Dorothy Thornton, “Fear, Duty, and Regulatory Compliance: Lessons from Three Research Projects” (Chapter 3), take a close look at the responses of firms to particular contexts of business regulation. As the latter three scholars note, academic interest in such responses was kindled by the post-Thatcher and Reagan embrace of cooperative enforcement strategies and the delegations of regulatory responsibilities to businesses and industry associations.

Drawing on extensive interviews with mid- and high-level executives, Braithwaite’s essay documents the endemic malfeasance and regulatory evasion at international pharmaceutical companies, made possible by the technical complexities of drug development and the jurisdictional gaps associated with global business networks. But he also shows that drug companies were not monolithic entities bent on pursuing short-term profits regardless of harms visited upon third parties. Instead, pharmaceutical “executives have plural identities and multiple loyalties to multiple organizations,” including the loyalties that researchers, physicians, lawyers, and accountants have to professional norms. Regulatory officials, Braithwaite argued, could take advantage of these fracture points within firms. Doing so, however, required the ability to see the “web of market ordering mechanisms” that sustained the drug industry and the willingness to rely on a mix of international regulatory cooperation, industry and firm self-regulation, and consumer activism.

Kagan, Gunigham, and Thornton pull together the results from three separate studies of behavior at corporations that have demonstrated above average compliance with environmental regulations. The three political scientists undertook in-depth interviews of managers at several pulp and paper mills and diesel truck companies, asking about their compliance culture and environmental performance. They also completed less intensive interviews with environmental compliance managers at a wider range of firms in eight industries, exploring corporate reactions to news reports of significant enforcement activity by regulators. This research reveals a complex interplay between the dynamics of regulatory deterrence, whether from fear of legal punishment or loss of reputation, and evolving social norms and professional sensibilities. The adoption of legal rules, these scholars argue, frequently generates new social norms about environmental duties, while their vigorous enforcement often sharpens their practical impact, mainly by focusing managerial attention on regulatory goals.

In my 2009 article, “Private Cops on the Fraud Beat: The Limits of American Business Self-Regulation, 1895–1932” (Chapter 4), I bring historical ethnography to the workings of non-governmental regulatory institutions. Drawing on newspaper coverage, trade journals, and archival collections, this essay reconstructs the creation of a new network of anti-fraud organizations, including the Better Business Bureau. The products of an elite social movement within the American business establishment that increasingly worried about the impact of deceptive marketing on consumer and investor confidence, these early twentieth-century organizations embraced public education, lobbying, the ongoing monitoring of business practices, and assisting in fraud prosecutions. In the process, they developed a professional ethos that gave them at least some distance from their corporate funders, as well as a strategic orientation toward the reshaping of economic norms—by businesses, investors, and consumers. But their ideological commitments also blinded them to a variety of questionable business practices by large, ostensibly reputable investment banks and retailers. This case study suggests the advantages of getting beyond a single temporal snapshot of informal regulatory culture, analyzing how organizational strategies, capacities, and interactions evolve in the face of shifting historical circumstances.

Part II: Business Regulation in Action: The Lens of Societal Comparison

The ethnographic approach to studying regulatory institutions, for all of its considerable advantages, runs the risk of digging so deeply into particulars as to obscure more general patterns and trends that hold across issue domains or geographic areas (or, by contrast, the realization that such discernible patterns are hard to spot). Sustained institutional comparisons, the subject of Part II, offer one useful means of remedying this potential shortcoming. Indeed, the essay on regulatory compliance by Kagan, Guningham, and Thornton takes this approach, considering compliance dynamics in a large number of firms within selected industries. They trade off a degree of ethnographic depth for a wider field of vision that convinces them of the challenges of specifying regulatory strategies that will most effectively trigger social norms for compliance, given the enormous differences among regulatory domains, industry structures, and societal legal cultures.
Many of the best comparative analyses of regulatory governance, like the 1999 essay by the political scientists Kazunari Aoki and John Cioffi, “Poles Apart: Industrial Waste Management Regulation and Enforcement in the United States and Japan” (Chapter 5), isolate approaches to a single issue in two different societies. Aoki and Cioffi focus on the operations of a multinational machine tool manufacturer during the 1990s, examining its strategies for dealing with one type of environmental regulation in the United States and Japan. In addition to several factory site visits, they conducted extensive interviews of several dozen regulators, firm employees, and industry association officials. This research design allows Aoki and Cioffi to show how differences in economic circumstance (domestic orientation in the United States, export orientation in Japan), and legal culture (a more prescriptive set of rules and more formal, authoritarian enforcement style in America; a more informal, cooperative enforcement style in Japan) produced dramatically different attitudes toward compliance with regulatory policy.

Managers at the American subsidiary expended far more time and money on compliance issues. Constantly embroiled in regulatory disputes, many of which involved fairly minor procedural infractions, the American executives tended to view environmental regulation as legal headaches to minimize. Japanese managers, by contrast, faced global market pressures for demonstrated competence in environmental management, as well as national regulators who set performance goals and valued consultation through “administrative guidance.” These circumstances, as Michael Porter and Cless van der Linde would have predicted, encouraged the placement of regulatory authority in the hands of “production personnel,” who sought efficient technical solutions to environmental problems.

Other comparative analyses, like the political scientist David Vogel’s 2003 article, “The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe” (Chapter 6), adopt much wider, macro-level comparisons. Synthesizing a burgeoning comparative literature on risk regulation, Vogel considers an ambition array of environmental, health, and consumer policies, a longer time scale (from the 1960s through the turn of the millennium), and a geographic frame encompassing almost all of Europe as well as the United States. This macro perspective, Vogel contends, reveals important geographic variations within the global trend toward the expansion of far-reaching regulatory constraints in these policy areas. Up to roughly 1985, “American regulatory standards tended to be more stringent, comprehensive, and innovative” than their European counterparts. Thereafter, northern European countries increasingly demonstrated greater reliance on vigorous regulatory initiatives to prevent or mitigate the social, environmental, and health risks associated with modern capitalism, particularly in situations where the precise nature of risks remained uncertain. The shift in Europe, Vogel submits, reflected the impact of well-publicized crises caused by weak European regulations, resulting political shifts that deepened European popular support for tougher regulatory action, and gradual improvements in the EU bureaucracy’s policy capabilities. Across the Atlantic, a general tide of political conservatism engendered greater skepticism about the exercise of regulatory authority.

Vogel’s account has given rise to a vigorous debate, signaled by Jonathan Wiener and Michael Rogers in their 2002 article, “Comparing Precaution in the United States and Europe” (Chapter 7). Wiener, a legal scholar, and Rogers, a specialist in risk analysis and science policy, take issue with Vogel’s generalizations on the basis of a similarly expansive overview of risk regulation in Europe and America. Pointing to issues such as the possibility of mad cow disease getting into blood supplies, in which American regulatory authorities moved far more aggressively than their European counterparts, Wiener and Rogers cast doubt on any clear pattern of greater regulatory precaution in post-1990 Europe, or more substantial regulatory risk aversion in pre-1985 America. Instead, they stress that the degree of regulatory precaution in industrialized countries has varied greatly from issue to issue, depending on a complex set of variables, including the structure of political and legal institutions, the nature of risk perceptions among elites and the general public, and the pattern of economic interests.

The comparative method in regulatory studies shows little sign of abating. Indeed, both Vogel and Wiener and Rogers (the latter pair joined by legal scholar Peter Sand and science policy specialist James D. Hamm) have subsequently fleshed out their respective arguments with more expansive research and fuller articulations of the interpretative positions. One may expect future comparative research to build on this debate, whether through clusters of detailed case studies or less comprehensive assessments of outcomes in a wider set of policy contexts (Wiener et al. attempt both). Such efforts, however, will likely expand the geographic terrain of analysis, playing closer attention to the dynamics of risk regulation in emerging economies.

Part III: Business Regulation in Action: Evaluating Regulatory Outcomes

The debate between Vogel and Wiener concerns the most accurate descriptive frame for risk-related regulatory policy-making in the industrialized world since 1960 and the most persuasive explanations for the adoption of those policies. During the last half century, a considerable proportion of science research on regulatory governance has taken on the additional and arguably more arduous task of assessing the socio-economic impacts of regulatory action. Such scholarly appraisals can shape policy reforms, especially when the pattern of research suggests a wide academic consensus. Recent proposals for a more experimental mindset in regulatory governance only heighten the importance of solid research techniques for gauging policy outcomes. Econometric methods have proved especially illuminating in this type of scholarship, which typically attempts to compare explicit regulatory goals with actual policy consequences. George Stigler’s 1971 essay, included in Volume I, embraced this approach (as did his other studies of regulatory policy). Part III includes three illustrations of this important vein of research.

The economists Harvey Averch and Leland Johnson authored an influential early example of this scholarship in 1962. Their essay, “Behavior of the ‘Firm under Regulatory Constraint’” (Chapter 8), examined the impact that classic economic regulation of infrastructural industries had on the strategic choices of regulated monopolies. Averch and Johnson constructed a formal model of economic behavior by such firms. Their model suggested that the calculation of regulated prices on the basis of “a fair rate of return” gave regulated monopolies a powerful incentive to over-invest, thereby padding the rate base and allowable tariffs. It also predicted that monopolies would frequently use their guaranteed returns in regulated markets to cross-subsidize entry into related competitive markets, even if they had to operate at a loss. The economists then tested the model by investigating pricing and investment patterns in the American telecommunications industry, finding empirical support for both propositions. Averch and Leland concluded by calling for additional studies of pricing, investment, and business strategy in other regulated industries. Their cell elicited scores of such studies, which documented similar dynamics in other regulated markets, and laid the intellectual foundations for shifts to marginal cost rate-setting and more far-reaching deregulation.
The second selection in Part III, a 2001 essay by the economist Scott Wallsten, applies a more sophisticated set of statistical techniques to consider the consequences of post-privatization economic regulation in a large set of developing economies. In “An Econometric Analysis of Telecom Competition, Privatization, and Regulation in Africa and Latin America” (Chapter 9), Wallsten investigates the impact of state divestiture of telecommunications infrastructure in thirty countries, all from the Global South. Comparing privatization that led to significant competition, privatization that created an effective monopoly constrained by a new independent regulatory authority, and privatization that generated an unregulated monopoly, he demonstrated that unregulated monopolies did significantly less to expand phone access or lower marginal costs. This research suggests the ongoing relevance of economic regulation for emerging economies that have opted for a reduced state role in the direct provision of basic utilities.

During the last two decades, social scientists have increasingly deployed statistical techniques to evaluate the successes and shortcomings of environmental, health, and safety regulations. The 2002 essay by the economists W. Kip Viscusi and Ted Gayer, “Safety at Any Price?” (Chapter 10), supplies an accessible introduction to one influential strand of this scholarship, which has emphasized the economic costs associated with many of these regulations. Viscusi and Gayer furnish a succinct overview of key aspects of cost–benefit analysis (readers would do well to assist it in conjunction with the selections in Volume II, Part III). Their chief goal, however, was a systematic presentation of regulatory costs and benefits associated with several dozen American risk regulations, including not just direct economic costs, but also their indirect creation of new risks. The enormous disparity in costs suggested by this evidence, they argued, fully justified the sort of regulatory oversight provided by OIRA: it further suggested the importance of trying to achieve regulatory goals through the sort of market-friendly regulatory policies discussed in the second and third parts of Volume II, so as to maximize the effectiveness of societal risk regulation.

Even the most sophisticated statistical analyses of regulatory outcomes, however, invariably rest on a foundation of qualitative assumptions, a point emphasized by the legal scholars Richard Revesz and Michael Livermore in their 2000 book, Reckless Rationality. Measurements of regulatory costs and benefits depend on all sorts of assumptions. They adopt a particular discount rate to ascertain the present value of future regulatory benefits. They have to impute monetary values to the prevention of specific injuries, illnesses, or deaths, in many cases using surveys that ask individuals who have not suffered such things what they would be willing to pay to avoid them. They often presume that the data provided by industry associations on compliance costs is accurate. They may seek to identify indirect and unintended costs, but not unexpected ancillary benefits. Even if one accepts that evaluation of regulatory policies calls for a utilitarian weighing up of their practical consequences, many interpretive devils will lurk in the details of calculation.

Recognizing this inescapable reality, assessments of regulatory outcomes often explicitly combine quantitative measurements with more qualitative methods, drawing on insights from ethnographic case studies, cognitive psychology, and historical analysis of institutional change. The next cluster of selections, “The Effectiveness of Regulatory Disclosure Policies” (Chapter 11), written by David Weil, Archon Fung, Mary Graham, and Elena Fagotto in 2006, “The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions” (Chapter 12), written by the sociologists Frank Dobbin and John Sutton in 1998, and “Regulation as the Mother of Innovation: The Case of SO2 Control” (Chapter 13), written by Margaret Taylor, Edward Rubin, and David Houngshell in 2005, illustrate different recipes for such methodological pluralism.

Drawing primarily on secondary literature, Weil, Fung, Graham, and Fagotto probe the impacts of a specific regulatory tool, mandatory disclosure, in eight well-established policy contexts: corporate accounting, restaurant hygiene quality, mortgage lending, nutritional labeling, toxic release reporting, workplace hazards, patient safety in healthcare facilities, and worker notification of plant closings. The authors — two public policy scholars, one an economist, and a legal scholar — chose to study mandatory disclosure because of its growing prominence since 1980. In an era characterized by skepticism toward light prescriptive regulatory rules, disclosure requirements beckoned to many policy-makers. Relatively inexpensive and non-intrusive, these requirements leveraged the power of information technology and supposedly had a market-enhancing character, since they sought to improve the capacity of consumers or investors to make sensible choices. (One might argue that the embrace of disclosure regimes represents another form of regulatory delegation — in this case to informed individuals.)

An entire field of psychological research, however, has raised questions about how economic actors process and make use of disclosed information. Mandated information might not be clearly presented to users, sufficiently salient to them, or available at a time when it would inform actual choices. And if information disclosure did not significantly change user choice, it was unlikely to reshape the business practices of disclosers. Weil et al. developed an analytical rubric to categorize behavioral responses to disclosure policies. In essence, they fashioned an index of informational embeddedness — the extent to which required data became key features of routine economic decision-making by users and disclosers alike. They then used both quantitative and qualitative findings from other studies of regulatory regimes to map their practical consequences. This map suggested important cautions about mandatory transparency as a regulatory approach. It would work best when the key problem actually rested with informational asymmetries, and policy-makers could design disclosure requirements so that salient information actually structured relevant market interactions.

Dobbin and Sutton investigated the impact of various American workplace regulations on large-scale corporations, including rules against employment discrimination, occupational safety requirements, and pension protections. In each of these national policy domains, rules tended to be ambiguous, subject to constant litigation, and prone to frequent revision and expansion, while agencies lacked significant bureaucratic capacity and inconsistently pursued enforcement actions. Dobbin and Sutton searched for evidence about organizational responses to these complex regulatory domains through extensive qualitative research in trade publications, annual reports, and management journals. They also conducted a survey of managers at 279 major employers. The ambiguity and fragmentation suffusing American workplace regulation, the sociologists maintain, stimulated considerable corporate investment in administrative capacity to track regulatory changes and implement internal policy responses to them. Once created, the professionals who ran the resulting divisions within personnel management constructed internal, efficiency-related rationales for their work, which helped to entrench a host of workplace practices. As a result, corporate diversity, workplace safety, and benefits initiatives had an enduring impact on business culture far beyond what an observer focusing only on government enforcement efforts might have expected.

Taylor, Rubin, and Hounshell (a scholar of engineering and policy, an engineering professor, and a historian of technology, respectively) use historical analysis to examine how the American
government's various policies to reduce power plant sulfur dioxide emissions influenced technological innovation. They show how four decades of regulatory policy-making affected the incentives for research and development (R&D) of power plant scrubbers, highlighting the interactions among shifting air quality standards, enforcement mechanisms, public R&D spending, and processes of innovation within an evolving "environment-industry complex." Their research methods were eclectic. They constructed quantitative data series about patent activity and scrubber usage and ran regressions of patent activity against both "technology-push" policies (public R&D spending) and "technology-pull" policies (regulation). But they also conducted intensive oral histories with regulators and engineers at environmental corporations that specialized in scrubbing technology. This multi-faceted, interdisciplinary research indicated that clear regulatory signals of stringent, environmental performance standards (a product of the 1970s) not only generated substantial corporate investment in pollution control technologies, but also stimulated greater collaboration among industry, government, and academic researchers and more substantial improvements in operating efficiency by power plants. The cap and trade system introduced in 1990 facilitated a wider array of pollution reduction strategies, such as switching to lower sulfur fuels, and so tempered technological investments. Taylor, Rubin, and Honnshell conclude that a regulatory structure of periodically revised performance standards would more plausibly drive new environmental technologies than emissions trading programs, which furnish weaker incentives for commitment to innovation across the entire environment-industry complex.

The remaining pair of selections for Part II, Allen Blackman and Nicholas Sisto’s 2006 article, “Voluntary Environmental Regulation in Developing Countries: A Mexican Case Study” (Chapter 14), and Christine Parker’s 1999 essay, “Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime” (Chapter 15), pursue more exclusively qualitative type of research. Each wrestles with the impact of contemporary business self-regulation. Blackman and Sisto shift the geographic focus away from the industrialized world, offering a detailed historical assessment of efforts to control the pollution caused by leather tanneries in the Mexican city of Leon. These two environmental economists frame their inquiry as a test of business self-regulation in an industrializing society that lacked strong regulatory bureauscacies and established public interest advocacy groups. Picking together their account from government documents, press coverage, and interviews, they document more than two decades of increasing concern over industrial pollution in Leon. The scope of the problem prompted the passage of various new environmental laws (almost all poorly defined and enforced) and four separate voluntary convenios, in which governmental officials and tanneries negotiated a set of environmental performance goals. Blackman and Sisto argue that institutional weaknesses in the public sector and a lack of sustained public pressure led policy-makers to direct their energies toward voluntary arrangements, and that this same weak "environmental infrastructure also undermined" those agreements. In the absence of public funds to pay for expensive pollution control technology or credible threats that inaction would prompt the enactment of stringent pollution regulations and investments in tough enforcement, tanneries refused to make pollution reduction a significant priority. Analogous institutional circumstances in other developing countries, the authors predict, would likely render voluntary environmental regulation ineffective for the same reasons. As with societal comparisons of regulatory policies, one can expect that future research on the impacts of business regulation will follow Blackman and Sisto’s lead, deepening the evidentiary base of knowledge about regulatory outcomes in emerging economies.

Relying primarily on in-depth interviews of regulatory protagonists, the legal scholar Christine Parker examines a far more successful example of self-regulation—the Australian legal framework for fair competition and consumer protection during the 1990s, which depended heavily on the activities of compliance officers within Australian corporations. This scheme has proved successful, Parker contends, for three reasons. First, the Australian trade practices regulators created strong legal incentives for corporations to create meaningful internal compliance programs. Second, the state set up the sort of reporting requirements that were previously missing in the voluntary programs of environmental regulation described by Blackman and Sisto. Finally, the Australian state invested considerable resources to make regulatory compliance officers part of a new profession, who identified with a wider regulatory community and the norms of professional integrity as much as with their employers. Parker’s research reveals the importance of recognizing that regulated businesses rarely act as monolithic entities only driven by the pursuit of short-term profits and of defining regulatory strategies accordingly.

Collectively, these various modes of evaluating discrete regulatory policies suggest the importance of matching research designs and analytical tools to the precise question at hand. If one wishes to evaluate the impact of a regulatory scheme on prices, market access, and income distribution within an economic sector, access to quantitative data and sophisticated statistical approaches will likely be indispensable. The same goes for consideration of policy impacts on health or environmental quality. By contrast, evaluations of policy formulation and implementation lend themselves to qualitative methods, with attention to bureaucratic capacity, ideological currents, the nature of public participation, and institutional culture.

Part IV: Pathways of Regulatory Change: Interests and Ideas

The final three sections of Volume III revisit the question of how to account for significant change in business regulation: determinations to introduce new regulations, tightening regulatory stringency, or deregulating in some area; the embrace of new strategies of institutional design; the widespread rejection of some policy instruments and their replacement by others. Perhaps unsurprisingly, the work of historians receives front billing here. But there are also contributions from political scientists, sociologists, and management and legal scholars. Each of the selected writings highlights a single pathway for new directions in regulation. As with developments in any other complex domain of life, however, mono-causal explanations rarely offer a full account of significant change.

For decades, the most common scholarly move in explaining a given piece of regulatory decision-making, whether it involves going in some new direction or standing pat, has been to seek out the economic interests at stake. Scholars of regulation on all sides of the political spectrum, from libertarians to neo-Marxists, and from every intellectual school, including devotees of public choice and New Left social analysis, instinctively follow the money. Much of George Stigler’s research reflects this tendency, so too the radical historian Gabriel Kolko’s work on the Progressive Era expansion of American regulatory institutions. Wherever proposals to regulate prices and entry emerge, social scientists begin to hunt for the economic groups whose interests would gain legal protection from competition.

The opening selection in Part IV, Lawrence Friedman and Jack Ladinsky’s 1967 essay, “Social Change and the Law of Industrial Accidents” (Chapter 16), shows how a shifting
balance of economic interests can complicate regulatory arrangements. Friedman, a legal historian, and Ladin, a sociologist, are interested in the structural processes that lead to fundamental reconstructions of policy frameworks. They pursue this more general concern by examining the state-level American adoption of administrative workman's compensation regimes in the early twentieth century, which replaced the earlier reliance on liability rules that placed significant burdens in the path of workers who brought lawsuits against their employers for job-related injuries. This shift, Friedman and Ladin argue, would not have occurred without the more assertive and powerful working class, who clamored for policy responses to a greater incidence of accidents. But it also reflected an accumulation of legal adjustments to tort law, encouraged by ongoing injury suits brought by lawyers working on a contingent fee basis, which generated higher legal costs and considerably increased legal uncertainty for large-scale industrial employers. Legislatures in industrial states only adopted workmen's compensation schemes once elite business organizations judged them to offer a meaningful cost of liability faced by manufacturers. And the business community expended considerable resources to shape the resulting policy frameworks, fighting hard to structure awards on the basis of lost income and to place the new regulatory system on an actuarial basis that made costs predictable.

Hardly any credible historical accounts of regulatory change ignore the significance of economic interests. But few persuasive arguments rest solely on this basis. For one thing, the economic interests involved in a complex regulatory issue often do not line up readily, even within a single industry. As the economist Donald Wittman has argued, most regulatory debates are many-sided affairs, with businesses voicing a variety of viewpoints, frequently in opposition to one another. In such instances of significant regulatory change, action arises from political coalitions that combine firms or industries with clear “interests” and reformers motivated by non-pecuniary commitments—a mix of “Baptists and Bootleggers,” in the influential formulation of the American economist and former regulatory official Bruce Yandle. 101

Appeals to economic interests, then, can only take scholars so far, especially if they wish not just to account for a decision to pursue regulation, but also why it occurred at a particular time, and took a particular institutional form, among all the various alternatives that received attention from policy-makers. Indeed, one of the greatest strengths of Friedman's and Ladin's article is that it connects the interplay of economic interests with evolving perceptions and ideas—especially cultural attitudes toward risk (far more individualistic conceptions of risk in an age of deadly epidemics and pervasive business failures), the relevant frontier of technology (improved safety engineering), and social scientific knowledge (statistical analyses of accident rates and legal payoffs, mostly prompted by the growing political agitation for regulatory action). All of these factors, they stressed, informed the degree to which policy-makers viewed industrial accidents as a “problem” demanding attention, as well as the potential means for addressing it.

Scientific ideas constituted one pivotal driver of the turn to modern regulatory institutions, as indicated by Elishe Harris's 1878 discussion of sanitation, presented in Volume 1. Occasionally, as with the 1962 publication of the biologist Rachel Carson's expose of pesticides, Silent Spring, the popularization of scientific research findings has dramatically forced regulatory issues onto policy agendas. And in some instances, a clear scientific finding, such as the demonstration that the drug thalidomide was responsible for birth defects, has led to rapid regulatory action. The following pair of articles, Sheila Jasanoff’s “Science, Politics, and the Renegotiation of Expertise at EPA” (Chapter 17), appearing in 1992, and Jean-Paul Gaudillière’s “Globalization and Regulation in the Biotech World: The Transatlantic Debates on Cancer Genes and Genetically Modified Crops” (Chapter 18), appearing in 2006, explore the regulatory impacts of scientific developments in more recent policy contexts. Jasanoff, a scholar of science and technology studies, considers the complex integration of scientific inquiry into the process of environmental regulation at the EPA. The EPA, she shows, initially operated on the premise that well-designed scientific inquiry would serve as a faithful compass for regulatory standard-setting. But as the agency veered into the challenging domain of environmental risk assessment, its scientific judgments provoked progressively more intense criticism from business interests, politicians, and other scientists. The resulting controversies prompted the EPA to adopt a series of institutional reforms, enlisting its scientific endeavors, such as the designation of carcinogenic chemicals, within elaborate procedural guidelines, requirements of external peer review, and an effort to separate the tasks of risk assessment more clearly from those of risk management. They also accelerated the politicization of regulatory science, as interest groups representing business, labor, consumers, and environmentalists scrutinized and evaluated it with ever more regularity. In this context, intellectual controversy, rather than consensus, drove far-reaching institutional reforms.

A French historian of science and medicine, Gaudillière, parses through the divergent regulatory reactions in the United States and France to novel means of genetic testing for breast cancer and new techniques for the genetic modification of crops. Here debate raged not over the regulatory implications of arguably ambiguous research findings, but rather over how regulatory agencies should respond to unambiguous technological breakthroughs made by corporations with global commercial ambitions. In France, both of these innovations elicited considerable opposition to America's vigorous assertion of global intellectual property rights; the development of genetically modified organisms (GMOs) further prompted strong concern over their potential health and environmental risks, as well as politically influential movements to protect the autonomy of small-scale farmers. In the United States, by contrast, regulatory debates focused more exclusively on health risks (to patients undergoing gene screening and to consumers of GMO crops), with far less follow-through to concrete regulatory actions. This comparison reveals the way that social, cultural, and economic contexts condition the reception of scientific ideas in political and regulatory processes. It also suggests the power of global trade rules to heighten national regulators' scientific concerns.

Transformative insights from the social sciences represent another important channel for shifting regulatory policy, a point suggested by several contributions in the first two volumes (Hadley's and Rosa's discussion of natural monopolies, Tugend's evaluation of inelastic markets, Commons' reflections on systemic stability, Kahn's insights about the relevance of marginal cost theory for industry deregulation, Viscusi's discussions of cost-benefit analysis). The political scientist Marc Elsner's 1990 essay, "Institutional History and Policy Change: Exploring the Origins of the New Antitrust" (Chapter 19), traces an analogous impact of Chicago School economic thinking on the redirection of American antitrust regulation in the 1980s. The new permissiveness toward mergers, acquisitions, and market concentration adopted by the Reagan Administration, Elsner demonstrates, only partly resulted from the ideological perspectives of political appointees to the Justice Department's Antitrust Division. At least of equal importance was the steady influx of economists into this division during the 1970s. These civil servants brought a conceptual mindset that was highly skeptical of prevailing policy, and
they possessed a set of analytical skills that laid the bureaucratic and evidentiary groundwork for a rapid transition to a new competition policy.

Part V: Pathways of Regulatory Change: Crises, Social Movements, Policy Entrepreneurs and Policy Learning

Economic interests, intellectual currents, and trends in the construction of knowledge can all weigh heavily on short-term policy calculations. But they often represent longer-term, structural conditions for institutional change, as well as mediators of the precise form of regulatory action. In accounting for the more proximate triggers of regulatory policy, and hence its timing, scholars frequently look toward other elements of historical context. Three dimensions stand out in this regard: events that garner sufficient public attention to compel some sort of policy response; the sustained demands of highly organized, dynamic social movements; and the creative leadership of well-placed officials.

Few rules of thumb occupy a more prominent place within the “common sense” of social science than the inclination to connect policy initiatives to preceding crisis events. The Global Financial Crisis of 2007–08 offers a powerful reminder of this causal avenue for regulatory reform. That recent episode generated significant rethinking about how to balance regulatory objectives in finance, the appropriate jurisdictional level for financial regulation, and the most sensible strategies and tools of systemic risk regulation. It also prompted wide-ranging policy adjustments in industrialized and emerging economies alike.

The economic historian Peter Temin considers in his 1985 essay, “Government Actions in Times of Crisis: Lessons from the History of Drug Regulation” (Chapter 20), the process that gives rise to regulatory action. His analysis cogently illustrates the dynamic in one American policy domain. Many of the most far-reaching extensions of American regulatory authority over drugs, Temin establishes, occurred in the immediate aftermath of “short-term trauma,” including the introduction in 1961 of a new liquid antibiotic containing diethylene glycol, which killed more than one hundred people. When the thalidomide scandal occurred in 1961 (a new drug that caused terrible birth defects, mostly in Europe), Congress enacted legislation that gave the Food and Drug Administration the power to refuse a drug application on the grounds that it was not effective. And the Tylenol tampering incident in 1982, which killed seven consumers of the analgesic, provoked Congress to require drug manufacturers to make their over-the-counter medicines tamper-proof. In each case, a sudden occurrence of scandal transformed the political context, creating windows of opportunity for the adoption of significant legislation.47

A substantial political science literature has examined the power of crises to generate policy shifts.48 Thomas Birkland’s 1996 article, “Focusing Events, Mobilization, and Agenda Setting” (Chapter 21), summarizes this research and sketches a useful conceptual model of how crisis events interact with policy communities and interest group politics. It further presents empirical measures of the resulting alterations in policy agendas, as well as some reflections about the limits of crisis as policy generators. Birkland defines focusing events as “sudden” and “relatively uncommon” occurrences that become “known to policy makers and the public simultaneously,” and that “can reasonably be defined as harmful or revealing the possibility of greater future harms,” with those harms being “concentrated in a particular geographic area or community of interest.” He stresses that events such as oil spills or nuclear accidents create opportunities for interest groups to expand their effective reach, convincing a wider constituency that they had an important stake in a given policy issue and that the status quo is unacceptable. Although geographic proximity often heightens receptivity to such efforts, sometimes a crisis captures the imagination of even distant observers, who see its implications for their own circumstances. Birkland further demonstrates that well-organized, cohesive policy communities frequently use post-crisis investigations to press lingering proposals for regulatory and other kinds of policy reforms. In the absence of such coordination, especially when opponents of change could effectively challenge causal explanations for the crisis, focusing events were far more likely to have only fleeting impacts on policy agenda setting.

This last point is important to keep in mind as one considers the policy implications of any significant scandal or disaster. In some cases, crises unleash a multi-year process of examination, debate, and significant policy adjustments. In others, their effects may extend only to short-lived media coverage and cosmetic (or even no) policy reforms. Some degree of historical perspective is crucial to make such distinctions. Thus only with hindsight will social scientists be able to gauge the regulatory implications of such seemingly consequential events as the 2010 BP Deepwater Horizon blowout and oil spill in the Gulf of Mexico, or the 2011 nuclear accident at Fukushima, or the post-2010 spate of factory disasters in South Asia.49

Just as crises do not necessarily lead to far-reaching regulatory innovations, regulatory innovations do not inevitably depend on dramatic scandals or disasters. In many instances in which governments expanded the reach of regulatory authority to some entirely new area, the spark for action came from social movements, which had spent years thinking through how to address some social problem and mobilizing broader public support for doing so. In the history of the United States, prominent examples abound. One might point to the role of post-Civil War agrarian populism in setting the stage for railroad rate regulation; or to the success of temperance groups in enacting prohibitions against alcohol in late nineteenth-century state legislatures and through an early twentieth-century constitutional amendment; or the pressures exerted by civil rights and women’s movements, which led to pro-World War II regulations against racial or gender discrimination in education, housing, credit, and employment. More recently, during the last quarter century, social activists in North America and Europe have pushed back vigorously against dimensions of economic globalism, initiating campaigns to temper the global trade regime with concerns for labor rights and environmental protection.50

The sociologist Tim Bartley’s 2003 article, “Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields” (Chapter 22), connects these efforts to the emergence of private certification schemes for the labor and environmental practices of firms engaged in global production networks. Bartley pieced together a complex narrative about the turn to transnational private regulation in the 1990s, a development that was powerfully shaped by the absence of public regulatory authorities at the global level, and in which several national governments played a facilitative role. The most important protagonists in his account, however, were labor and environmental groups. The activist leaders of these groups took the lead in publicizing the weak labor and environmental records of the firms supplying major consumer retailers in industrialized countries. In addition, they helped to formulate proposed labor and environmental standards for participants in those supply chains, threatened consumer boycotts as a means of getting
these companies to take private certification schemes seriously, and helped to set up monitoring and enforcement mechanisms.

For any social movement wishing to move the arc of regulatory policy, a central challenge is to recent widely held beliefs that set the initial normative terms of policy debate. This challenge typically requires attention to strategies of normative framing—the sorts of stories that policy activists on all sides of a debate use to characterize a given issue and potential policy alternatives. The 2004 article by political scientists Susan Sell and Anu Mitra Prakash, "Using Ideas Strategically: The Contest between Businesses and NGOs in Intellectual Property Rights" (Chapter 23), considers this crucial dimension of regulatory politics. Sell and Prakash undertake two case studies from the politics of international trade regulation—the addition of intellectual property rights to GATT rules in 1992 and the subsequent rejection of a proposed enforcement campaign against several countries on intellectual property grounds, for their violation of AIDS drug patents. They show that in the debates surrounding these highly contested regulatory questions, business organizations and public advocacy NGOs each assiduously tried to shape the moral frame of the public debate; and that success in doing so went a long way toward gaining preferred regulatory outcomes. Sell and Prakash thus make a strong case for the salience of normative framing, though precise measurement of its impact in any given context may prove elusive.198

If the most immediate pressures for regulatory change often come from outside the state, at other times they emanate from within officialdom. And even when social movements or other interest groups raise a sufficient nexus to make some form of regulatory action likely, they do not necessarily have sufficient clout to control the details of policy formulation. One recurring theme in scholarly examinations of regulatory change is the catalytic role played by policy entrepreneurs, sometimes in driving regulatory innovation, and almost always in determining the precise contours of new policies. These individuals, usually regulatory officials, help to define social or economic problems, construct specific policy solutions out of prevalent ideas and conceptual frameworks, build political coalitions in support of regulatory action, sometimes on the basis of small-scale policy experiments, and then implement initial policy blueprints. As Peter Temin’s analysis of American drug regulation points out, savvy officials frequently have taken advantage of the political opening following a crisis to drive through longstanding reform proposals that had previously been stymied by strong political opposition or institutional inertia. Often, Temin observes, the reforms had little or nothing to do with the specific issues presented by the precipitating event.

Bureaucratic initiative in regulatory policy-making, though, is by no means wholly dependent on convenient focusing events, a point underscored by the next trio of writings: the historian Wilson Miskimins’s 1982 essay, "Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the New Deal" (Chapter 24); the political scientist Paul Sabatier’s 1988 article, "An Advocacy Coalition Framework of Policy Change and the Role of Policy-Oriented Learning Therein" (Chapter 25); and the political scientist David Levi-Faur’s 2005 reflection on "The Global Diffusion of Regulatory Capitalism" (Chapter 26). Although not using this term, Miskimins deploys this interpretive trope to account for the New Deal’s redirection of American antitrust policy. Thurman Arnold, the historian argues, used his position as the head of the Justice Department’s Antitrust Division to become the indispensable conductor of this shift. He clarified the purposes of antitrust regulation, concentrating on concerns for the interest of consumers rather than competitors. He fashioned a new strategic policy of industry-wide prosecutions, developed the new tool of the consent decree, and assiduously cultivated public support for his program. More recently, scholars such as Daniel Carpenter have put forward even more detailed assessments of historical instances in which policy entrepreneurs built up reputational capital, developed bureaucratic capacity and expertise, and used these assets to gain support for regulatory innovation.199

Paul Sabatier adopts an analogous approach in his work on advocacy coalitions. Sabatier notes alert to the broader contexts that shape regulatory policy, such as economic trends, demographic transitions, the pressures generated by social movements, and electoral outcomes. He similarly takes account of how dramatic events catapult issues into the political spotlight. But he nonetheless emphasizes the capacity of experts within a given issue domain to shape the trajectory of regulatory policy. Sabatier describes the networks created by these experts, which typically incorporate civilian servants in various agencies and jurisdictional levels, leading academics, the researchers and analysts who work for relevant businesses and interest groups, and journalists with a given policy beat. Within any “policy sub-system,” these individuals possess specialized knowledge, which enables them to take the lead in delineating the problems that require state interventions and crafting potential policy responses, including new approaches to regulation. Usually, the larger amalgam of specialists cluster into a small number of distinct, stable advocacy coalitions, which share a general outlook and set of priorities with regard to the issue domain, which tend against each other in the policy process and broader public debate. These experts additionally undertake the ongoing tasks of evaluating policy implementation and its socio-economic consequences, engaging in “trial and error learning” that at least sometimes “alter[] their belief systems,” despite powerful cognitive tendencies among experts to resist challenges to their worldviews. In order to make sense of regulatory change in industrialized societies, Sabatier concludes, such actors have to examine policy-making over a sufficiently long time horizon to appreciate this process of policy learning. In complex policy areas such as air pollution (or, as we are now seeing with financial regulation in the wake of the Global Financial Crisis), this set of feedback loops occurs over at least a full decade.

David Levi-Faur examines a different sort of regulatory learning: the pattern of cross-jurisdictional policy borrowing. The interconnected nature of modern capitalism has confronted many societies with analogous challenges, while creating ample opportunities for policy elites to learn from initiatives elsewhere, whether through comparative research or formal interactions with counterparts in other countries. Global flows of ideas and the emergence of transnational policy networks encouraged processes of regulatory mimicry, even if the precise details of regulations always reflect some degree of local distinctiveness. In every age, such policy borrowing tends to reflect the broader patterns of geopolitical relationships, with ascendant nations usually serving as models for other polities. Levi-Faur surveys this dynamic in the last quarter-century of the twentieth century, with an especially broad sweep that incorporates most of the themes presented in Volume II. His essay outlines the North American and European turn to privatization and economic deregulation, but also the companion expansion of environmental and health protections, the deregulation of many privatized markets, and the emergence of new forms of regulatory delegation (self-regulation; cap and trade systems). It then depicts the rapid diffusion of this overarching policy structure to numerous emerging and developing economies. Most helpfully, Levi-Faur further distinguishes between "top-down," "horizontal," and "bottom-up" drivers of diffusion, arguing that a growing proportion of regulatory policy convergence has reflected horizontal borrowing by policy elites.
increasingly integrated into transnational networks of expertise. (Jonathan Wiener makes an analogous argument in his essay on the spread of regulatory oversight bodies, presented earlier in Volume II.)

**Part VI: Pathways of Regulatory Change: Organizational and Legal Culture**

The last segment of this Research Collection considers the influence of institutional structures and especially legal culture on patterns of regulatory change. Paul Sabatier’s essay (included earlier in Part V of this volume) supplies a succinct overview of how a given set of institutional arrangements filters policy debates and implementation. The remaining pair of selections, both written by historians, each considers how, in the face of strong pressures for new departures in regulatory governance, a society’s legal culture often screens out some policy alternatives and favors others.

The first of these writings, Frank Ueckrodt’s 1999 essay, “Divergent Responses to Identical Problems: Businessmen and the Smoke Nuisance in Germany and the United States, 1880-1917” (Chapter 27), employs a comparative method to foreground legal institutions, attitudes, and customary behaviors in the process of regulatory innovation. Ueckrodt contrasts German and American regulatory responses to an enduring problem caused by the rise of coal-powered industrialization throughout Europe and North America—urban air pollution. This approach resembles the methodology of Aoki and Cioffi in their comparison of late-twentieth-century industrial waste disposal in Japan and America, substituting intensive research in archives, public reports, and the contemporaneous press for intensive interviews. Ueckrodt finds that in both late-nineteenth-century Germany and America, the business community, on the whole, opposed smoke abatement as a public good (though a minority of American manufacturers did strenuously oppose any regulatory action by the state). But environmental efforts in German cities were hamstrung by a legal culture that depended on private nuisance complaints and emphasized formal sanctions for violations of pollution standards. In the United States, regulatory efforts concentrated more on identification of best technological practices and their dissemination by smoke inspectors, who acted as more than consultants as police. This less punitive and more cooperative legal culture, Ueckrodt concludes, resulted in more substantial reductions in industrial pollution.

In the 2009 article, “The Politics of Administrative Law: New York’s Anti-Bureaucracy Clause and the O’Brien–Wagner Campaign of 1938” (Chapter 28), the legal historian Daniel Ernst explores a pivotal turning point in the history of American regulation, shaped by a commitment to proceduralism reminiscent of the German bureaucracy described by Ueckrodt. Focusing on a pivotal Senate campaign involving the congressional architect of New Deal labor regulation, Ernst investigates the vigorous opposition among segments of the American legal and political establishment to the Roosevelt Administration’s extensions of regulatory clout. Critics from towns and smaller cities voiced great anxieties about new regulatory arrangements. They viewed the agencies charged with redressing the distribution of economic power (the National Labor Relations Board, the Agricultural Adjustment Administration, the Securities and Exchange Commission) as running roughshod over basic principles of due process, and they strongly advocated greater procedural protections for the businesses regulated by them. Such sentiments represented popular expressions of the procedural complaints issued by academics such as Ernst Freund and Roscoe Pound (eventually echoed by Hayek). As Daniel Ernst shows,

the political salience of these anxieties paved the way for the passage of the Administrative Procedure Act, which imposed much greater procedural formality on the American regulatory state.

Other writings in Volume III similarly speak to the capacity of legal culture to channel the evolution of regulatory institutions. Thus Aoki and Cioffi show that the degree of formalism within a society’s legal institutions can powerfully mold the implementation of its anti-pollution efforts, while Black and Siste indicate that an emerging economy’s fragmentary bureaucracies and limited traditions of regulatory enforcement can lower policy-makers down the path of business self-regulation. These case studies remind social scientists and policy entrepreneurs that proposals for regulatory reforms never take place in a legal vacuum. Particularly in the short to medium term, law and legal culture can exert formidable constraints on regulatory choices. One can think of this pattern as a version of path dependency.

**Historical Perspective and the Modern Regulatory State in the Twenty-First Century**

This Research Collection draws on roughly a century and a half of experience with regulatory institutions as a means of contextualizing ongoing debates over business regulation. This complicated legacy suggests that legislators and regulatory officials would do well to manifest some humility as they make policy. But it also underscores the inescapable role of regulatory policy in constructing modern markets and the capacity of well-designed and sensibly implemented regulations to achieve compelling social goals. Historical perspective broadens awareness of policy alternatives and sharpens thinking about how to pick among them. Knowledge of regulatory pasts can inoculate decision-makers against the worst manifestations of policy myopia, which tends to become more common as bureaucratic memory recedes a generation or two after the adoption of key regulatory initiatives. Multi-faceted historical analysis additionally offers crucial tools for assessing regulatory outcomes and thus achieving the ideals of flexible policy adjustments that so powerfully animated the creation of modern regulatory institutions.

The past, then, certainly can inform the present. But historical understanding can offer more than glimpses of the future. Any attempt to predict trends in business regulation over the next few decades, or even trends in interdisciplinary scholarship about business regulation, is sure to be a perilous exercise. The writings in these three volumes indicate the complex evolution of modern business regulation, with many twists and turns only sometimes anticipated by contemporaries. But those writings also point to several recurring themes, both in the history of policy and the study of regulatory governance, that will most likely shape intellectual inquiry for some time.

Many of these analytical refrains pose difficult, even agonizing, counterevidence. How should policy-makers strike the appropriate balance among competing regulatory objectives (economic efficiency and scope for innovation, versus consumer protections and environmental sustainability, or the legitimation of capitalist institutions through the encouragement of countervailing power), whether within or across issue areas? When policy goals conflict, as they so often do, what defaults should structure regulatory decision-making when the fact-finding process is bedeviled by scientific uncertainties? How can policy-makers gain the advantages of dispassionate technocratic specialization while retaining effective democratic oversight and ensuring sufficient popular participation in decision-making? In which contexts...
should policy-makers presume that economic actors are motivated chiefly by rational calculations of narrow self-interest, and in which situations should they rather presume more communal motivations, or behavior that follows from cognitive lapses or irrational considerations? How can regulators keep their agencies nimble and their rule-making and enforcement attuned to shifting technology and economic conditions, while still maintaining sufficient respect for the certainty associated with the rule of law? What strategies enable regulators to know enough about the exceedingly complex economic sectors that they oversee without making them captives of industry priorities? Which regulatory challenges demand concentration of regulatory authority at continental or global levels, and which make more sense to leave in the hands of national, provincial, or local governments? In which contexts should regulators extend delegation even further, to businesses or third parties, and how should they go about ensuring sufficient accountability when they do so? These enduring policy dilemmas and trade-offs will surely continue to deserve careful study and generate intense debate.

One can perhaps further identify some future intellectual priorities (for policy-makers, regulated businesses, advocacy groups, and academics alike) that reflect the more distinctive characteristics of our current age. The rapid creation of regulatory institutions and networks in emerging economies (China, Brazil, India, Mexico, South Africa) has only begun to attract significant study. Strategies of global/transnational private regulation, like business self-regulation more generally, have prompted far more research, but are nonetheless good bets to remain of abiding concern. In light of the last three decades' burgeoning concentrations of power in many economic sectors, as well as the extraordinary growth in economic inequality, we may well see heightened reexamination of competition policy and renewed consideration of regulatory strategies that seek to create economic counterweights to MNCs, whether through empowering consumers and labor unions, or by reconfiguring the basic structures of particular industries and markets, perhaps through new strategies of unit trust enforcement.

If there is one prediction about business regulation in which one might place the greatest confidence, it is that attempts to understand and inform regulatory policy will continue to be a scholarly growth industry. As I hope this collection demonstrates, the regulatory governance of modern capitalism has become a magnet for scholars from every social science discipline. The increasingly interdisciplinary nature of this scholarship is reflected in the emergence of several new journals, such as Regulation and Governance and the European Journal of Risk Regulation, as major social science publications. And the multi-disciplinary character of regulatory decision-making has attracted the notice of individuals with extensive experience in the trenches of policy-making, who have begun to call on universities to expand the disciplinary scope of professional training for regulators. We have every reason to expect that the next generation of scholarship will provide us with both a deeper empirical base and fresh conceptual perspectives on this crucial dimension of contemporary governance.

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Notes


2. English language scholars, for example, have paid relatively scant attention to Latin traditions of regulatory inspectors, whether in Europe or other parts of the world shaped by European immigration and imperial rule, such as Latin America and Africa. I am indebted to Marc Schneiberg for this important point.


38. Jerry Mashaw and David Hirsh have traced the mid-twentieth-century emergence of this regulatory emphasis on systematic analysis and engineering design standards in their book, The Struggle for Auto Safety (Cambridge, Mass., 1990).


42. For a discussion of disclosure as a regulatory tool in contexts of social protection, see Florence Kelley, Social Services through Legislation (New York, 1902), 9–11.

43. For the definitive discussion of mid-twentieth-century American drug regulation, see Daniel Carpenter, Regulation and Power: Organizational Image and Pharmaceutical Regulation at the FDA (Princeton, 2010).

44. For contemporaneous American articulation of this view by the Yale sociologist William Graham Sumner, see What the Social Classes owe Each Other (New York, 1883), especially 119–32; and Stine Interference, North American Review 360 (1877): 109–19.


46. For a recent comprehensive overview of this scholarship see William J. Novak, “A Revisionist History of Regulatory Capture,” in Daniel Carpenter and David Moss, eds., Preventing Regulatory Capture: Special Interest Influence and How to Limit It (New York, 2013).


52. Marc Essner, "Discovering Patterns in Regulatory History: Continuity, Change, and Regulatory Regimes," Journal of Policy History 6 (1994): 157. Three British social scientists – political scientist Christopher Hood, geographer Henry Rothstein, and legal scholar Robert Baldwin – have put forward a related but somewhat narrower definition of “risk regulatory regime”: they use the phrase “to denote the complex institutional geography, rules, and practice, and animating ideas that are associated with a particular risk or hazard.” The Government of Risk: Understanding Risk Regimes (Oxford, 2001), 9; Hood, Rothstein, and Baldwin also stress the interplay among institutional design, broader philosophy of government, strategic approach, and preferred instrument choice. But their frame of reference is a single issue domain within the broader terrain of risk regulation, rather than overarching policy architectures that cut across issue domains and regulatory rationale.


58. On these institutional developments, see also Fabrizio Caffagni, Legitimacy and Effectiveness of Globalization (forthcoming).


61. These events will surely prompt considerable scholarship in the years to come. At present, the most extensive analysis has come from NGOs and government agencies. See, for example, Clean Clothes Campaign, Garments Workplaces: Making the Bangladesh Garment Industry Safe (November 2012), available at: http://www.cleanclothes.org/resources/publications/2012-11-


65. On this linkage outside Europe, see David Levi-Faur's "The Global Diffusion of Regulatory Capitalism" in Volume III.


72. For useful discussions of several of these themes, see David Vogel, "The New Social Regulation in Historical and Comparative Perspective," in McCraw, Regulation to Perspective, 155-85.


76. A related line of argument stressed the importance of assessing "risk risk tradeoffs," in which policies to address one type of risk, such as smog, might reduce the air pollution by coal-fired power plants, might create new risks, such as threats to groundwater from the discharge of scrubbers. See Jonathan Wiener and John D. Graham, Risk v. Risk: Tradeoffs in Protecting Health and the Environment (Cambridge, Mass., 1997).


93. For a useful overview of these conflicting tendencies, see Eills Ferrer, Nandi Wolokon, Jennifer G. Hill, and John C. Coffee, Jr., The Regulatory Aftermath of the Global Financial Crisis (Cambridge, 2012).


95. For other studies of regulatory agencies that include a significant ethnographic dimension, see: Sarah Shapiro, Bureaucratic Capitalists: Targets of the Securities and Exchange Commission (New Haven, 1987); Amellie Ries, Collaborative Knowledge: Legal Reasoning in the Global Financial Markets (Chicago, 2011).


100. See also Sunstein, "Empirically Informed Regulation.


framework for assessing the specific causal relationships among crisis events, the framing narratives of policy entrepreneurs, and the dynamics of policy change.

105. For two leading works, see Frank Baumgartner and Bryan Jones, Agenda and Instability in American Politics (Chicago, 1993); John Kingdon, Agenda, Alternatives, and Public Policies, 2nd ed. (New York, 1995).

106. For a much fuller discussion of these themes, see Edward Balleisen, Lori Bezemek, Kimberly Krawiec, and Jonathan Wiener, eds., Policy Shock: Regulatory Responses to Oil Spills, Nuclear Accidents, and Financial Crashes (forthcoming with Cambridge University Press).

107. See, for example, David Held and Anthony McGrew, Globalization/ Anti-Globalization: Beyond the Great Divide (Cambridge, 2007); Jeffrey Juris, Networking Futures: The Movements against Corporate Globalization (Durham, North Carolina, 2008).


109. Daniel Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928 (Princeton, 2001). Readers, however, may wish to consider such explanations in conjunction with retooling section of the Friedman and Ladinsky article, which critiques the historical agency of key actors like Arnold, or John R. Commons, who took a leading role in forging the compromises that produced Wisconsin’s workers’ compensation law. For Friedman and Ladinsky, social and economic conditions prepared the way for such talented leadership, which would be likely forthcoming from some quarter so long as societal demand for policy change was strong enough.

110. For another comparative essay that emphasizes the role of legal culture in shaping regulatory outcomes (in this case, the extent to which expert regulators operated within the framework of formal regulatory bodies or professional associations), see Arthur D. Bound, “A Tale of Two Experts: Thalidomide and Political Engagement in the United States and West Germany,” Social History of Medicine 15 (2002): 137–58.

111. For a more sustained consideration of how historical expertise can inform regulatory policy-making, see Edward J. Balleisen and Elizabeth Brake, “Historical Perspective and Better Regulatory Governance: An Agenda for Institutional Reform,” Regulation and Governance 8 (2014): 222–45.

112. For a recent articulation of a multi-faceted research agenda that grapples with these themes, see Balleisen and Moss, eds., Government and Markets, 538–44.


Part I

Varieties of Regulatory Purpose: Constituting Markets and the Search for Growth