In recent years, regulation has emerged as one of the most distinct and important fields of study in the social sciences, both for policy-makers and for scholars who require a theoretical framework that can be applied to any social sector. This timely textbook provides a conceptual map of the field and an accessible and critical introduction to the subject. Morgan and Yeung set out a diverse and stimulating selection of materials and give them context with a comprehensive and critical commentary. By adopting an interdisciplinary approach and emphasising the role of law in its broader social and political context, it will be an invaluable tool for the student coming to regulation for the first time. This clearly structured, academically rigorous title, with a contextualized perspective is essential reading for all students of the subject.

Bronwen Morgan is Professor of Socio-legal Studies at the University of Bristol. Her research focuses on the political economy of regulatory reform and global governance. She is the author of Social Citizenship in the Shadow of Competition (2003).

Karen Yeung is Professor of Law at Kings’ College London. She was a university lecturer at Oxford University and a Tutorial Fellow in Law at St Anne’s College from 1996 until 2006. Her research lies in the intersection of public law and socio-economic regulation.
The Law in Context Series

Editors: William Twining (University College London) and Christopher McCrudden (Lincoln College, Oxford)

Since 1970 the Law in Context series has been in the forefront of the movement to broaden the study of law. It has been a vehicle for the publication of innovative scholarly books that treat law and legal phenomena critically in their social, political and economic contexts from a variety of perspectives. The series particularly aims to publish scholarly legal writing that brings fresh perspectives to bear on new and existing areas of law taught in universities. A contextual approach involves treating legal subjects broadly, using materials from other social sciences, and from any other discipline that helps to explain the operation in practice of the subject under discussion. It is hoped that this orientation is at once more stimulating and more realistic than the bare exposition of legal rules. The series includes original books that have a different emphasis from traditional legal textbooks, while maintaining the same high standards of scholarship. They are written primarily for undergraduate and graduate students of law and of other disciplines, but most also appeal to wider readership. In the past, most books in the series have focused on English law, but recent publications include books on Europe law, globalisation, transnational legal processes and comparative law.

Books in the Series

Anderson, Schum & Twining: Analysis of Evidence
Ashworth: Sentencing and Criminal Justice
Barton & Douglas: Law and Parenthood
Bell: French Legal Cultures
Bercusson: European Labour Law
Birkinshaw: European Public law
Birkinshaw: Freedom of Information: The Law, the Practice and the Ideal
Cane: Atiyah’s Accidents, Compensation and the Law
Clarke & Kohler: Property Law: Commentary and Materials
Collins: The Law of Contract
Davies: Perspectives on Labour Law
Dembour: Who Believes in Human Rights?: The European Convention in Question
de Sousa Santos: Toward a New Legal Common Sense
Diduck: Law’s Families
Elworthy & Holder: Environmental Protection: Text and Materials
Fortin: Children’s Rights and the Developing Law
Glover-Thomas: Reconstructing Mental Health Law and Policy
Gobert & Punch: Rethinking Corporate Crime
Harlow & Rawlings: Law and Administration
Harris: An Introduction to Law
Harris, Campbell & Halson: Remedies in Contract and Tort
Harvey: Seeking Asylum in the UK: Problems and Prospects
Hervey & McHale: Health Law and the European Union
Lacey & Wells: Reconstructing Criminal Law
Lewis: Choice and the Legal Order: Rising above Politics
Likosky: Transnational Legal Processes
Likosky: Law, Infrastructure and Human Rights
Maughan & Webb: Lawyering Skills and the Legal Process
McGlynn: Families and the European Union: Law, Politics and Pluralism
Moffat: Trusts Law: Text and Materials
Norrie: Crime, Reason and History
O’Dair: Legal Ethics
Oliver: Common Values and the Public—Private Divide
Oliver & Drewry: The Law and Parliament
Picciotto: International Business Taxation
Reed: Internet Law: Text and Materials
Richardson: Law, Process and Custody
Roberts & Palmer: Dispute Processes: ADR and the Primary Forms of Decision-Making
Scott & Black: Cranston’s Consumers and the Law
Seneviratne: Ombudsmen: Public Services and Administrative Justice
Stapleton: Product Liability
Tamanaha: The Struggle for Law as a Means to an End
Turpin: British Government and the Constitution: Text, Cases and Materials
Twining: Globalisation and Legal Theory
Twining: Rethinking Evidence
Twining & Miers: How to Do Things with Rules
Ward: A Critical Introduction to European Law
Ward: Shakespeare and Legal Imagination
Zander: Cases and Materials on the English Legal System
Zander: The Law-Making Process
An Introduction to Law and Regulation
Text and Materials

Bronwen Morgan and Karen Yeung
Cambridge University Press
978-0-521-68565-8 - An Introduction to Law and Regulation: Text and Materials
Bronwen Morgan and Karen Yeung
Frontmatter
More information
To Jim
To Duncan
## Contents

*Preface and Acknowledgements*  
page xiii

*Figures*  
xvii

1 Introduction  

2 Theories of regulation  

2.1 Introduction  

2.2 Public interest theories of regulation  

2.2.1 Welfare economics approaches  

2.2.2 Substantive political approaches  

2.2.3 Procedural political approaches  

2.2.4 The role of law in public interest theories of regulation  

2.2.5 Discussion questions  

2.3 Private interest theories of regulation  

2.3.1 Political private interest approaches  

2.3.2 Economic private interest approaches  

2.3.3 The role of law in private interest theories  

2.3.4 Discussion questions  

2.4 Institutionalist theories of regulation  

2.4.1 Tripartism  

2.4.2 Regulatory space  

2.4.3 Systems theory  

2.4.4 The role of law in institutionalist approaches  

2.4.5 Discussion questions  

2.5 Conclusion  

3 Regulatory instruments and techniques  

3.1 Introduction  

3.2 Understanding regulatory instruments  

3.2.1 Command  

3.2.2 Competition  

3.2.3 Consensus  

3.2.4 Communication
3.2.5 Code 102
3.2.6 Classification and hybridisation 105
3.2.7 Discussion questions 113

3.3 Instrument choice 113
3.3.1 Prescriptive approaches and tool-efficacy 116
3.3.2 Politics, legal culture and institutional variety 132
3.3.3 Discussion questions 146

3.4 Conclusion 146

4 Regulatory enforcement and compliance 151
4.1 Introduction 151
4.2 The limits of rules 153
4.2.1 Discussion questions 175
4.3 The enforcement of rules and agency behaviour 176
4.3.1 Observational studies of agency behaviour 181
4.3.2 Normative approaches to enforcement 193
4.3.2.1 Normative prescriptions developed from empirical observation 193
4.3.2.2 Value-based critiques of enforcement practices and prescriptions 200
4.3.3 Discussion questions 203
4.4 Public and private enforcement 203
4.4.1 Civil and criminal liability 203
4.4.2 Enforcement rights 209
4.4.2.1 Economic analysis of public and private enforcement 209
4.4.2.2 Public discretion and private rights 210
4.4.3 Discussion questions 215
4.5 Conclusion 215

5 Regulatory accountability and legitimacy 221
5.1 Introduction 221
5.2 Levels of theorising 223
5.3 Regulatory accountability 228
5.3.1 Discussion questions 236
5.4 Varying logics of regulatory legitimation 237
5.4.1 Discussion questions 253
5.5 Regulatory legitimacy and democracy: Between expertise and pluralism 253
5.5.1 Discussion questions 279
5.6 Decentred regulatory legitimacy: Beyond and above the state 280
5.6.1 Discussion questions 298
5.7 Conclusion 299
### Contents

6 Regulation above and beyond the state  
6.1 Overview 303  
6.2 Theories of regulation 306  
   6.2.1 Public interest theories 306  
   6.2.2 Private interest theories 308  
   6.2.3 Institutionalist approaches 310  
   6.2.4 Conclusion 312  
6.3 Techniques of regulation 313  
   6.3.1 Command 313  
   6.3.2 Competition 315  
   6.3.3 Consensus 316  
   6.3.4 Communication 318  
   6.3.5 Code 320  
   6.3.6 Complex hybrids and the role of law 320  
6.4 Enforcement 322  
   6.4.1 Problems with rules 323  
   6.4.2 Public enforcement of supranational norms 325  
   6.4.3 Private and civil society enforcement 326  
      (a) Enforcement through law 326  
      (b) Non-legal enforcement mechanisms 328  
   6.4.4 Summary 329  
6.5 Legitimation 330  
   6.5.1 Varying logics of regulatory legitimation 330  
   6.5.2 Conceptions of democracy and the role of law 331  
6.6 Conclusion: Law’s role in regulation above and beyond the state 332  
   6.6.1 Discussion questions 334  
7 Conclusion 338  

Index 345
The origins of this book can be traced back to an informal conversation between us in 1999 as two young legal academics at Oxford University shortly after discovering our shared interest in the nature and workings of the administrative state. This prompted us to consider the possibility of putting together a postgraduate course with the rather broad title ‘Regulation’. As neither of us had previous experience in teaching such a course, we began somewhat tentatively, seeking to devise a course that would encourage students to interrogate legal institutions beyond the confines of a narrow focus on legal doctrine. Our ambition was to cultivate in our students what Roberto Unger calls an ‘institutional imagination’, one that highlights the challenges of institutional design in public policy-making and practice so as to enrich and enliven their understanding of the law and its contribution to the regulatory enterprise.

It was in the process of locating suitable material for our proposed course that we discovered the lack of any textbook to guide us and our students. Although there were several valuable essay collections, as well as books that adopted one particular disciplinary orientation in examining regulation, there was no single book which satisfactorily fulfilled our pedagogical objectives. What we wanted was a scholarly yet accessible text which both drew together a broad range of perspectives and examined a wide range of regulatory issues. In the absence of such a text, we proceeded by gathering rather disparate materials from legal, social-scientific and policy sources, organising them around our conceptual frame and amalgamating them into a course-pack. But problems remained. In particular, we were asking our students to engage with somewhat disparate strands of social scientific literature which they had not previously encountered. Many often struggled to identify how these strands related to each other or, indeed, to the legal tradition to which they were accustomed. In short, there was an acute need for a text that provided an organising frame for interrogating the variety of disciplinary approaches to regulation, and this provided us with the impetus to write this book.

Although the original course was constructed with postgraduate law students in mind, this book is intended to introduce both lawyers and non-lawyers alike to the study of regulation. While the meaning of the term ‘regulation’ is heavily contested and subject to multiple academic interpretations, our approach to the
subject is much broader than many lawyers’ understandings of the term. We were reminded of just how narrow a lawyer’s understanding of the term can be from the incredulity expressed by a newly arrived law student, who thought that our entire course was devoted to delegated legislation — and who was much relieved to discover that this was not the case. We understand ‘regulation’ scholarship as a broad and open-ended category that can readily apply to many forms of intellectual inquiry concerning the purposive shaping of social behaviour, particularly state and non-state standard-setting, monitoring and behaviour-modification processes. Seen in this light, the topic may be of general interest to social scientists who are not lawyers, particularly those who find ‘regulation’ as a category of inquiry cropping up in the course of their work. Those concerned with globalisation and supranational governance may also find the chapter on regulation above and beyond the state of direct relevance.

Given that one of our aims is to help lawyers and legal scholars engage with a considerable body of scholarship that does not always directly focus on law, we have woven an argument about the role of law in regulation into our commentary. This argument is complementary to our more general mapping of the field, so that the resulting survey should still be valuable to readers who are less concerned with the role of law. Readers may also disagree with our argument about the role of law without it affecting the integrity of the general mapping exercise.

Although the structure of the book broadly reflects the conceptual framework which we originally adopted when we first offered our Regulation course, we have continually revised and refined the course over the years in light of feedback from our students. Some have continued to pursue their academic inquiry into regulation in the form of research degrees, while others are now embarking on their own academic careers. Still others have gone on to work in regulatory contexts as varied as public sector reform in Singapore and gas operations in Bolivia. Thus, it is to our former students that we owe our primary debt of gratitude. We have learned much from them, and their input was invaluable in refining the structure and presentation of this book as well as the material we have chosen to extract. Several former students have told us that studying regulation provoked them to think about the law and social institutions in an entirely fresh light, and bearing witness to their intellectual enthusiasm has been one of our richest rewards.

Special thanks are due to the Oxford University postgraduate law students who took the course in 2005–6, many of whom read the entire manuscript, identifying areas where further clarification, explanation or restructuring were needed. We are also enormously indebted to Roger Brownsword, Denis Galligan, Simon Halliday, Kathy Liddell, Anne Meuwese, Tony Prosser and Stephen Weatherill, who provided critical yet encouraging feedback on the first draft of the manuscript and were able to offer a more dispassionate and objective critique of our work than we could provide to each other. Oxford University Law Faculty and the Oxford Centre for Socio-legal Studies provided support and assistance both in developing the course and in bringing the book to completion, not least
by making it possible to employ our indispensable research assistants, Anna Oldmeadow and Elen Stokes, without whose help the task of completing the manuscript would have been considerably more painful and protracted. We are also grateful to Sinead Moloney, Anjana Narayanan and Finola O’Sullivan for skilfully steering the manuscript through the production process. Finally, we wish to thank each other. Teaching and writing together has been a privilege, not only in terms of intellectual stimulation but also for the sheer fun involved. Our hope is that this book reflects our enthusiasm for the study of regulation and demonstrates how stimulating and rewarding such a study can be.

KY and BM
London and Bristol
18.10.06
Figures

Figure 1.1 Law’s image
Figure 3.1 The new governance paradigm
Figure 3.2 Social costs
Figure 3.3 Rule A
Figure 3.4 Response to different sanctions
Figure 3.5 Change to liability under Rule B
Figure 4.1 Frequency distributions of ambulance response times
Figure 4.2 Factors affecting regulatory enforcement style
Figure 4.3 Example of an enforcement pyramid. The proportion of space at each layer represents the proportion of enforcement activity at that level
Figure 4.4 Example of a pyramid of enforcement strategies
Figure 5.1 Examples of linkages between values and accountability institutions
Figure 5.2 Main characteristics of regulatory state
Figure 5.3 Accountability for provision of telecoms services 2. Interdependence model
Figure 5.4 Features of the three justice models
Figure 7.1 Law’s image