

## Contents

<i>List of Figures</i>	<i>page</i> xiii
<i>List of Tables</i>	xiv
<i>Acknowledgments</i>	xv
<i>List of Abbreviations</i>	xvii
<b>Introduction: Why Innovation Is Not (Just) Romantic, and Regulation Is Not Dull</b>	1
Innovation and Regulation	1
Innovation, Progress, Hope	7
What Does Contemporary Regulation Look Like?	9
A Thought Experiment: Innovation-Fostering Regulation	12
On Regulation: The Way Forward	18
<b>1 Innovation as a Regulatory Challenge: Four Stories</b>	24
The Innovations: Securitization and Derivatives	27
Four Regulatory Moments	31
Enron and Derivatives: Gameable Bright-Line Rules	31
ABCP in Canada: Outdated Assumptions about the Market	32
Basel Capital Adequacy Rules: Evolving into and Out of Innovation-Framing Regulation	35
The Volcker Rule: Innovation as Silencing to Non-Experts	39
Innovation and Regulation: Three Misperceptions	42
Complexity and Dynamism: The Reality and the Narrative	43
The Assumption That the Regulatory Moment Is the Important One	45

	The Assumption That Regulation Sits Outside Innovation and Is Not Directly Implicated by It	46
	Conclusion	48
<b>2</b>	<b>How We Got Here: The History and Roots of Flexible Regulation</b>	51
	The Regulatory State as an Idea	54
	From Welfare State to Regulatory State	56
	Shifting Ideologies in the Move to the Regulatory State	66
	The Influence of Economics in the New Innovation- Framing Regulation	67
	Risk as Regulatory Touchstone	69
	The Philosophical Dimension in Flexible Regulation	73
	Governance, Regulation, and the Shattering of Authority: The Phoenix Rises	75
<b>3</b>	<b>Four Key Perspectives: Flexible Regulation and the Link to Innovation</b>	79
	Lord Turner's Charge	79
	The Concern with Flexibility	83
	Opening Up and Accepting Contingency, by Degrees	84
	Responsive Regulation	85
	Reflexive Law	88
	Smart Regulation	91
	New Governance and Experimentalism	92
	Abiding Insights from Flexible Regulation	96
<b>4</b>	<b>Flexible Regulation Scholarship Blossoms and Diversifies: 1980–2012</b>	101
	An Empirical Review of the Flexible Regulation Scholarship, 1980–2012	103
	How Is Flexible Regulation Meant to Be Better?	105
	The Regulatory Scaffolding and the Spaces Within It	106
	How Central Were Market Forces?	109
	What Was the Regulatory Innovation Trying to Achieve?	111
	Does a Rising Tide Lift All Boats?	112
	Financial Regulation Scholarship as Outlier	113
	What Relationship between Private Innovation and Regulatory Innovation?	115
	Flexible Regulation and Innovation	118

<b>5</b>	<b>Why Flexible Regulation Was Not Simply a Misguided, Neoliberal Project</b>	121
	Flexible Regulation and Ideology	122
	Politics: Flexible Regulation and Progressive Values	122
	Authority and the Market: Milton Friedman or Karl Polanyi?	125
	Decentralization: James Madison or Friedrich Hayek?	128
	Translation to Practice: Promising the Moon and the Sky through Regulatory Innovation	131
	Where the Scholarship Does Not Reach: Understanding Innovation as a Regulatory Challenge	135
<b>6</b>	<b>Refocusing Regulation around the Challenge of Innovation</b>	139
	Flexible Regulation, Innovation, and Finance	139
	Starting Points from the Innovation Literature	144
	How Do Innovations Develop? Creation, Diffusion, and Swarming	149
	Can We Apply These Insights to Financial Innovation?	152
	Who Is Innovating?	153
	What Are Their Innovations and Why Are They Pursuing Them?	155
	How Do Innovations Develop?	157
	Where and When Does “Swarming” Happen?	159
	Takeaway Points: Reframing Regulation around Innovation	161
<b>7</b>	<b>Seismic Innovation: The Radical Step Change as Regulatory Opportunity</b>	166
	The Characteristics of Seismic Innovation	171
	American Railroads and Financial Innovation in the Gilded Age	173
	Deepwater Oil Drilling	176
	Twenty-First-Century Financial Innovation in Securitization and Derivatives	178
	What Kinds of Problems do Seismic Innovations Present for Regulation?	180
	Uncertainty and Illegibility	180
	Hindsight Bias, <i>Ex Post</i> Overreactions	183
	What Regulatory Responses to Seismic Innovation Make Sense?	186
	Meta-Regulation or Experimentalist Regulation	186
	Safety-Case Regulation	187
	The Precautionary Principle and/or <i>Ex Ante</i> Licensing	189
	Reflections on Responding to Seismic Innovation	191

<b>8</b>	<b>Sedimentary Innovation: Responding to Incremental Change</b>	194
	What Is “Sedimentary Innovation?”	194
	Sedimentary Innovation as Regulatory Opportunity and Regulatory Challenge	196
	The Impact of Network Effects: Brandeis and the “Swarm”	200
	Networks as Institutional and Social Phenomena	202
	Herding and the First-Mover Advantage	206
	Making Sense of Sedimentary Innovation	207
	Humans Struggle to See Sedimentary Change	207
	Epistemological Problems and Awareness Problems	210
	Regulatory Boundaries and Coordination Problems	212
	Sedimentary Innovation and Flexible Regulation	213
	Potential Regulatory Responses to Sedimentary Innovation	215
<b>9</b>	<b>Innovation-Ready Regulation: Learning to See Financial Innovation</b>	218
	Responding to Innovation as a Technical Regulatory Challenge	220
	The Normative Piece: On Deliberation and Contingency	233
	On Financial Regulation, Fairness, and Equality	236
	<i>Appendix A: Methodology</i>	239
	<i>Appendix B: Coding Questions</i>	248
	<i>Appendix C: Additional Coding</i>	252
	<i>Notes</i>	259
	<i>Select Bibliography</i>	339
	<i>Index</i>	349