

Contents

<i>Foreword</i>	xvii
Bronwen Morgan	
<i>Preface</i>	xxiii
<i>Acknowledgements</i>	xxvii
<b>Introduction</b>	<b>1</b>
<b>Part I Foundations</b>	
<b>1 Introduction to Economics</b>	<b>17</b>
Introduction	17
1.1 Basic Concepts: Rational Choice, Efficiency and Market Failures	19
1.1.1 Rational Choice Theory, Equilibrium and Efficiency	19
1.1.2 Market Failures	24
1.1.3 Economic Regulation and Social Regulation	31
1.2 Transaction Economics	33
1.3 Introduction to Behavioural Economics	36
1.3.1 Cognitive Biases	36
1.3.2 Cognitive Biases and Behavioral Design	38
Conclusion	40
Discussion Questions	40
<b>2 The Rise of Risk in Regulatory Governance</b>	<b>41</b>
Introduction	41
2.1 What Do We Mean by ‘Risk’?	42
2.2 Technical Approaches: Risk as an Object of Scientific Quantification and Assessment	46
2.3 Psychological, Sociological and Cultural Approaches to Risk	53
2.3.1 Risk Perception Studies	53
2.3.2 The Social and Cultural Dimensions of Community Responses to Risk	55
2.4 Regulation as Public Risk Management?	60
2.4.1 Risk as a Regulatory Object	60
2.4.2 Risk Assessment and the Role of ‘Regulatory Science’	64

2.5	Uncertainty, the Precautionary Principle and Public Action	68
2.6	The Riskification of Everything?	73
	Conclusion	77
	Discussion Questions	77
<b>3</b>	<b>Technological Innovation</b>	<b>79</b>
	Introduction	79
3.1	Technological Change Throughout History	81
3.2	The First Machine Age: The Industrial Revolution	82
3.3	The Second Machine Age	85
3.3.1	Platforms, Networks and the ‘Platform Economy’	85
3.3.2	Enhanced Capacity for Surveillance, Control and Exploitation?	89
3.3.3	Impact on Others	91
3.4	The Relationship between Technological Change and Society	99
3.5	Politics and Technological Innovation	103
3.5.1	The Myth of Technological Neutrality: Artefacts Have Politics	104
3.6	Management Studies: Understanding and Fostering Innovation	106
3.7	Towards ‘Responsible’ Technological Innovation?	110
3.8	Taming Technological Change through Law?	112
3.8.1	Does the Law Have a ‘Pacing’ Problem?	112
3.8.2	Temporal Challenges: Whether, When and What?	115
	Conclusion	117
	Discussion Questions	117
 <b>Part II Design, Dynamics and Implementation</b>		
<b>4</b>	<b>Theories of Regulation</b>	<b>119</b>
	Introduction	119
4.1	Public Interest Theories	121
4.1.1	Economic Approaches	121
4.1.2	Non-economic Conceptions of the Public Interest	
	Justifying Regulation	123
4.1.3	Critiques of Public Interest Theories	130
4.2	Private Interest Theories of Regulation	130
4.2.1	The Chicago Economic Theory of Regulation	131
4.2.2	Public Choice	133
4.3	Institutionalist Theories	137
4.3.1	Complexity and Systems Theories	137
4.3.2	Networked Theories	139
4.4	Hybrid Theories	142
4.4.1	Institutionalist and Public Interest Hybrids	142
4.4.2	Public and Private Hybrids	144
	Conclusion	146
	Discussion Questions	146

<b>5</b>	<b>Regulatory Policy</b>	<b>147</b>
	Introduction	147
	5.1 Regulatory Policy: Historical Background	148
	5.1.1 The New Deal	148
	5.1.2 The 1970s: CBA, Deregulation and Quantification	149
	5.1.3 The 1990s: Regulatory Quality	152
	5.2 Cost-benefit Analysis	154
	5.2.1 Discounting	154
	5.2.2 Critique	156
	5.2.3 Current Approaches: Climate Change, Race and Inequality	158
	5.3 Regulatory Impact Assessment	159
	5.3.1 RIAs and Better Regulation	160
	5.3.2 Critique	162
	5.4 Consultations	163
	5.4.1 Rationale	163
	5.4.2 Critique	164
	Conclusion	166
	Discussion Questions	166
<b>6</b>	<b>Regulatory Modalities, Instruments and Techniques</b>	<b>168</b>
	Introduction	168
	6.1 Command	169
	6.2 Competition	171
	6.3 Consensus	175
	6.3.1 Self-regulation	175
	6.4 Communication	178
	6.4.1 Public Communication Campaigns	179
	6.4.2 Voluntary Disclosure and ‘Transparency’ Initiatives	182
	6.5 Design or ‘Code’ as Control	185
	6.5.1 Regulation by and through Software Algorithms	189
	Conclusion	192
	Discussion Questions	192
<b>7</b>	<b>Hybrid Instruments and Experimental Regulations</b>	<b>194</b>
	Introduction	194
	7.1 Hybrid Techniques, Sources of Authority and the Role of Intermediaries	194
	7.1.1 Meta-regulation	194
	7.1.2 Hybrid Forms of Self-regulation	200
	7.1.3 Algorithmic Reputation and Rating Systems	204
	7.2 Instrument Choice	207
	7.2.1 Relative Costs	207
	7.2.2 Prescriptive Approaches and Tool-Efficacy	211
	7.2.3 Normative Conflict, Organisational Interests, Local Contexts and Political Power	212

7.3 Experimental Regulation	224
7.3.1 Temporary Regulations	224
7.3.2 Experimental Regulations and Regulatory Sandboxes	226
Conclusion	230
Discussion Questions	230
<b>8 Regulatory Rules</b>	<b>232</b>
Introduction	232
8.1 Rules and Their Limits	232
8.1.1 The Nature of Rules	232
8.1.2 Rules, Principles and ‘Principles-based Regulation’ (PBR)	240
8.1.3 Performance or ‘Outcome’-based Standards vs ‘Process’-based Standards	243
8.2 Formalism, Gaming and ‘Creative Compliance’	250
8.2.1 ‘Playing’ the Rules Rather Than Playing by the Rules?	250
8.2.2 Algorithmic Rules: Algorithmic Gaming, Circumvention and Secrecy	251
8.3 Standardisation and ‘Technical’ Standards	253
8.4 Stabilising Interpretive Uncertainty	260
8.4.1 Administrative Guidance and ‘Soft’ Law	261
8.4.2 The Role of Negotiation, Dialogue and Discussion	262
8.4.3 The ‘Liquid’ Nature of Informal Interpretive Authority within Transnational Regimes	264
8.5 Interpreting the Facts and Circumstances	267
8.5.1 Regulatory Science and the Need for Specialist Expertise	268
8.5.2 The Rise of ‘RegTech’ and Automated Enforcement	270
Conclusion	272
Discussion Questions	274
<b>9 Regulatory Compliance, Public Enforcement and Private Certification</b>	<b>275</b>
Introduction	275
9.1 Public Enforcement Action	277
9.1.1 Public Enforcement Discretion: The Human(s) in the (Enforcement) Loop	277
9.1.2 How Do Regulatees Understand Compliance?	278
9.1.3 Prescriptive Guidance for Public Enforcement Officials	281
9.2 ‘Risk-based’ Regulation in Enforcement	282
9.2.1 Risk-based Regulation as a Guide to Prioritising Enforcement Resources	282
9.2.2 Risk-based Regulatory Enforcement Architectures	285
9.3 Regulatory Investigations and Investigative Powers	289
9.4 Regulatory Sanctions	290
9.5 The Role of Litigation via the Courts	294
9.6 Private Certifiers and Auditors as Regulatory Intermediaries	295
Conclusion	299
Discussion Questions	299

<b>10</b>	<b>Private Enforcement and Redress</b>	<b>301</b>
	Introduction	301
	10.1 Legal Rights, Duties and Models of Responsibility	302
	10.1.1 Civil Actions for Damages	303
	10.1.2 Models of Legal Responsibility	304
	10.2 Enforcement Rights and Group Actions	309
	10.3 The Role of Judicial Adjudication	309
	10.4 Judicial Review of Administrative Action	313
	10.5 'Alternative' and Non-judicial Avenues for Redress	317
	Conclusion	317
	Discussion Questions	320
	 <b>Part III Evaluation</b>	
<b>11</b>	<b>Regulatory Legitimacy</b>	<b>321</b>
	Introduction	321
	11.1 The Concept of Legitimacy	322
	11.1.1 Objective Approaches to Legitimacy	325
	11.1.2 Subjective Approaches to Legitimacy	327
	11.2 Regulatory Legitimacy	333
	11.2.1 Expertise as the Basis for Regulatory Legitimacy	334
	11.2.2 Democracy	339
	11.2.3 The Rule of Law	344
	11.3 Legitimacy Evaluations and the Struggle for (Regulatory) Legitimation	349
	11.3.1 The Quest for Legitimation	350
	11.3.2 Regulatory Legitimation and Multiple Audiences	353
	Conclusion	355
	Discussion Questions	356
<b>12</b>	<b>Regulatory Accountability</b>	<b>357</b>
	Introduction	357
	12.1 The Concept of Accountability	359
	12.1.1 The Importance of Accountability and its Key Elements	359
	12.1.2 Accountability as 'Answerability' and as 'Control': Principal-Agent and Stewardship Theories	363
	12.2 Transparency and Independent Scrutiny	368
	12.2.1 Transparency	369
	12.2.2 The Duty to Explain	372
	12.2.3 Independent Oversight: Watchdogs	375

xvi	Contents	
	12.3 Contemporary Regulatory Accountability Challenges	377
	12.3.1 Privatisation and Contracting Out	378
	12.3.2 Many Hands, No Hands, Many Eyes?	381
	12.3.3 Multiple Accountabilities	383
	12.3.4 Algorithmic Accountability	384
	Conclusion	387
	Discussion Questions	387
	<b>Conclusion</b>	<b>388</b>
	<i>References</i>	393
	<i>Index</i>	401