

Handbook on Theories of Governance

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7. Public law and regulatory theory

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Increased involvement, delegation and deference to non-state actors has probably been the most important change to the regulatory state in the past three decades (Jordana and Levi-Faur 2004; Shamir 2010). This chapter explains the rise of governance in the context of public law as a shift from rulemaking by governmental institutions to rulemaking coming from private organizations and other civil actors. I highlight this evolution along three dimensions: prelude to governance, from government to governance, and beyond governance. While law remains necessarily a public function, the private role in the construction and meaning of regulation, compliance and law itself is more salient and celebrated than ever before.

PRELUDE TO GOVERNANCE: THEORY AND DEBATE OVER PUBLIC LEGAL INSTITUTIONS IN THE TWENTIETH CENTURY

Contemporary studies of governance in public law emerge from an important history. For much of the twentieth century, public law scholars across a variety of disciplines studied law as a “top-down” process, a system of rules coming from the command of government or, more precisely, public legal institutions. Traditional instruments of lawmaking by public legal institutions such as legislatures, courts and administrative agencies include formal rules and stipulations, adversarial methods, enforceable means of dispute resolution and command-and-control regulatory mechanisms. Within this top-down framework, research focusing on public law often examines the relationship between businesses and legal institutions.

Considerable theoretical and empirical focus is devoted to explaining the way interest groups that directly participate in governmental processes such as legislatures and administrative agencies lobby for laws and regulatory rules that serve their interests (Mills 1956; Dahl 1961; Polsby 1963; Dahl 1967; Shapiro 1988). Interest group studies interested in understanding structural business power examine how business occupies a privileged position in society (Lindblom 1977). Other scholars interested in instrumental aspects of business power examine how interest groups form advocacy coalitions that lobby, negotiate for favorable laws, build (or set) an agenda in their strategic favor or exert direct influence on government decisionmakers through campaign contributions (Kingdon 1984; Baumgartner and Jones 1993; Leech et al. 2002; Kamieniecki 2006).

Taking a more transactional view of the legislative process, public choice theorists apply economic models to legislative and administrative decisionmaking. Under this approach, politicians and the electorate are considered rational utility-maximizers operating in a competitive electoral and legislative market (Becker 1983). As interest

groups participate in a political market, they demand legislation, which provides benefits to legislators, who in turn supply them with governmental largesse. While instrumental, structural and public choice approaches are all different, they each analyze interest groups as rational, strategic actors seeking direct influence over governmental institutions.

Faced with command-and-control regulatory mechanisms that include formal rules and requirements, businesses try a variety of approaches to influence not just legislation but regulatory policy (Bernstein, M. 1955; Stigler 1971; Posner 1974; Quirk 1981; Vogel, D. 1989, 1995). Beginning in the 1950s and 1960s, United States regulatory agencies became the subject of debates between economic or capture-cartel theories and their critics (Herring 1936; Huntington 1952; Bernstein, M. 1955; Kolko 1965). Capture theory suggests that regulation is "acquired by the industry" and designed and operated primarily for its benefit (Stigler 1971: 3; Posner 1974; Becker 1983). In order to survive, regulators employ a regulatory strategy that meets industry demands for favorable policy. Although capture takes a variety of forms, typically capture studies focus on business capture of *existing* governmental regulatory agencies.

In sum, prior to governance, public law scholars focused on the relationship between business and government. Interest groups, public choice and capture studies of public legal institutions explain public law as a top-down process, where legislators and regulators try to coerce or in some cases encourage organizations to comply, while organizations engage in rational, strategic choices as to whether to comply and how to influence legal mandates (Jordana and Levi-Faur 2004; Braithwaite 2008). At all times, public law was produced by government. In this view law is exogenous to organizations even as it is open to organizational influence. Thus, studies of government made great strides in explaining how businesses directly influence government outputs, whether they are laws made by legislatures or legal rules implemented and enforced by administrative agencies.

FROM GOVERNMENT TO GOVERNANCE—COLLABORATIVE APPROACHES TOWARD BUSINESSES AND LEGAL INSTITUTIONS

More recently, business's relationship with regulatory institutions has undergone a dramatic change owing to the transformation of the regulatory state over the past 30 years. In particular, the location of governmental decisions shifted away from traditional public governmental institutions. The top-down "command-and-control" regulation of the 1960s and 1970s spawned heightened capture and interest group pluralist behavior. In response to the backlash and inefficiencies of big government and political change at the executive and congressional levels of government, the 1980s and 1990s saw a shift toward privatization, liberalization (free market capitalism) and devolution to the private sector (Majone 1997; Bignami 2004a, 2004b; Streeck and Thelen 2004; Levi-Faur 2005; Braithwaite 2008).

Despite popular belief that regulation was abandoned when neoliberalism was adopted around the Western world in the 1980s, empirical evidence suggests that

privatization, deregulation and the nurturing of markets under neoliberal governments *expanded* and *extended* regulation across the world (Vogel, S. 1996; Jordana and Levi-Faur 2004; Levi-Faur 2005; Braithwaite 2008; Parker and Nielsen 2011). For example, Jordana and Levi-Faur (2003, 2004) analyzed the decision to privatize telecommunications and electricity and the decision to create regulatory agencies in 171 countries and showed not only “intimate associations” between privatization and the creation of independent regulatory agencies but a significant increase in both since the 1980s. Moreover, Jordana and Levi-Faur (2003, 2004) studied regulation in 16 sectors across 49 different countries from 1920 to 2002 and found that the number of regulatory agencies rose sharply in the 1990s.

Thus, the purported deregulation and drive toward free markets has led to a slow re-regulation of free markets in the form of soft regulation aimed at perfecting market performance (Majone 1997; Levi-Faur 2005). New regulatory models anchored by contractual arrangements, standards, rankings and monitoring frames are increasingly being used by states (Djelic and Sahlin-Andersson 2006). As Djelic and Sahlin-Andersson note, “[i]nterestingly, the proliferation and expansion of those new regulatory patterns is both shaped by market logics and has a tendency to introduce and diffuse market principles” (Djelic and Sahlin-Andersson 2006: 7). For example, the “new public management” emphasizes efficient results and treating core government functions with a more market-based, competition-driven philosophy (Peters 1996; Terry 1998). Performance standards emerge whereby regulators specify the outcomes or the desired level of performance while leaving organizations the flexibility and discretion to come up with ways to achieve such ends (Gunningham and Sinclair 2009).

While regulatory capitalism and privatization are the reality (Levi-Faur 2005), soft regulation, rather than the direct provision of public and private services, is the expanding part of government (Vogel, S. 1996; Levi-Faur 2005; Schneiberg and Bartley 2008). “Hard laws” and directives coming with the coercive backing of the state decline as states move toward a broader conception that establishes legally non-binding “soft” rules such as standards and guidelines (Djelic and Sahlin-Andersson 2006).¹ This transformation from hard to soft rules led constitutional law, administrative law, jurisprudence and political science scholars across the world to focus less on government and more on “governance.”

Governance signifies “the range of activities, functions, and exercise of control” by both public and private actors in the promotion of social, political and economic ends (Lobel 2004: 344). Governance scholars view traditional regulation and command-and-control techniques as too narrow and incomplete a policy framework to accomplish social goals. Governance models are positioned in between top-down “command-and-control” regulatory models and industry self-regulation. Governance models conceptualize a world where boundaries are largely in flux and are being shaped by public and private actors, including states, international organizations, professional associations, expert groups, civil society groups and business organizations (Freeman 1997; Majone 1997; Freeman 2000; Sturm 2001; Braithwaite 2002; Lobel 2004; Ansell and Gash 2008). Broadly, governance approaches typically support the replacement of the New Deal’s hierarchy and control with a more participatory and collaborative model in which government, industry and society share responsibility for achieving policy goals.

Regulation is still an important component of governance, but governance goes beyond mere regulation by focusing on the dense organizing, discursive and monitoring activities that embed, frame, stabilize and reproduce rules and regulations. Under a new era of public-private partnerships between corporate and state actors, non-governmental actors are taking a more active role in governing themselves and trying to maintain the public good (Majone 1997; Ansell and Gash 2008). In areas relating to the financial industry, health care, policing, criminal justice administration (prisons), education, family, transportation, information technology, privacy, and environmental and consumer protection, public agencies are directly engaging non-state actors in collective decisionmaking. These co-regulatory schemes are consensus oriented and deliberative and aim to allow private industry more direct involvement and control in implementing public policies (Braithwaite 1982; Kagan et al. 2003; Lobel 2004; Ansell and Gash 2008; Freeman and Minow 2009). Whereas governments use traditional instruments such as formal rules and stipulations, adversarial methods, enforceable means of dispute resolution and command-and-control regulatory mechanisms, governance models use a series of new tools such as nonadversarial dialogue and organizational learning. Presumably, these tools lead to the development of principles, guidelines, best-performance standards and various soft law instruments. It is important to note that governance models vary and should be thought of as on a continuum, often operating somewhere in between command-and-control and pure self-regulation (Jordana and Levi-Faur 2004).

Since the 1980s, governance through regulation has been the central reform across the United States (Talesh 2012), the European Union (Majone 1994, 1997), Latin America (Manzetti 2000; Jordana and Levi-Faur 2003), East Asia (Jayasuriya 2001) and developing countries (Cook et al. 2004). Countries increasingly contract out government services, streamline government functions, cut the delivery of many services and benefits traditionally run by public institutions, and devolve power to lower levels of government, which in turn look to private actors to help execute their new responsibilities (Salaman 1995). The neoliberal agenda of freer markets and the accompanying "more rules" or "good governance" is internationalized, and was extended globally to Asia and the developing world via bilateral trade negotiations, the International Monetary Fund and the United Nations Conference on Trade and Development in the 1980s and 1990s (Braithwaite and Drahos 2000). In Europe, the term "soft law" is often used to describe the variety of regulatory innovations that move regulation toward greater reliance on private ordering. This form replaces legally binding rules and adjudicatory mechanisms with broad guidelines and private sector rulemaking, norm setting and harmonization projects in governmental, inter-governmental and transnational arenas (Abbott and Snidal 2000). Specifically, soft law regulatory forms such as non-state-based regulation, including voluntary industry and internal corporate systems of self-regulation and non-governmental organization (NGO) certification and management systems, are growing at the national and international levels (Braithwaite and Drahos 2000; Bernstein, S. and Cashore 2007).

In an attempt to keep pace with the international growth of governance models, socio-legal scholars and political scientists focus on establishing the theoretical foundations of governance. Scholars articulate various theories of governance, including but not limited to: "reflexive law" (Febbrajo and Teubner 1992), "soft law"

(Jacobsson 2004; Trubek and Trubek 2004), “collaborative governance” (Freeman 1997), “democratic experimentalism” (Unger 1998; Dorf and Sabel 1998, 2000; Dorf 2003), “responsive regulation” (Ayres and Braithwaite 1992; Braithwaite 2002), “outsourcing regulation” (O’Rourke 2003), “reconstitutive law” (Stewart 1986), “post-regulatory law” (Teubner 1986), “revitalizing regulation” (Farber 1993), “regulatory pluralism” (Gunningham and Sinclair 1999), “decentering regulation” (Black 2001), “meta-regulation” (Morgan 1999), “contractarian law” (Dana 2000), “communicative governance” (Kooiman 1993), “negotiated governance” (Krawiec 2003), “destabilization rights” (Sabel and Simon 2004), “cooperative implementation” (Michael 1996), “interactive compliance” (Sigler and Murphy 1988, 1991), “public laboratories” (Liebman and Sabel 2003), “deepened democracy and empowered participatory governance” (Fung and Wright 2003), “nonrival partnership” (Minow 2002), “daring legal system” (Minow 2002), “renew deal governance model” (Lobel 2004), “delegated governance” (Bamberger 2006) and “regulatory capitalism” (Levi-Faur 2005).

Empirical studies of governance concepts try to highlight the new instruments and techniques of regulation. Empirical studies account for the new types of legality, including negotiated rulemaking, management-based regulation and other regulatory systems that try to follow the logic of governance (Coglianese 1997; Coglianese and Nash 2001; Coglianese and Lazer 2003; Howard-Grenville 2005). Ayres and Braithwaite’s (1992) idea of responsive regulation involves greater participation of non-state entities in the regulatory process and greater emphasis on dialogue and persuasion rather than sanctions and adversarial methods as a means to ensure compliance. Consistent with governance theories, responsive regulation presupposes and to some extent encourages private and self-regulation and anticipates state regulatory structures that rely on multiple participants and actors. Ayres and Braithwaite attempt to go beyond the politics of deregulation while understanding that command-and-control regulation also has drawbacks. Studies of responsive regulation reveal the proliferation of private and public-private regulatory structures (Nielsen 2006; Parker 2006; Braithwaite 2008).

Thus, perhaps the most innovative aspect of governance approaches is not the newness of the model but the *recognition* of the model whereby regulation operates concurrently and in cooperation with the background of markets and social interactions (Lobel 2004).² Regulatory governance focuses on explaining what motivates organizations to comply with legal regulation, go beyond compliance and analyze the conditions most conducive to non-enforced compliance (Kagan et al. 2003; Gunningham et al. 2004; Fairman and Yapp 2005; Albareda et al. 2008; Haines 2009; Parker and Nielsen 2009, 2011). Because law was traditionally thought of as formed and defined outside of organizations and prior to reaching organizational domains, studies emphasize private organizations’ strategic motivations for complying or not complying (Simpson 1992, 1998; Vaughan 1998), social and legal license pressures (Kagan et al. 2003) or moral value laden concerns (Tyler 1990).

The theoretical and empirical studies of governance suggest that the governance turn in public law reflects a normative preference for a more effective social and environmental regulation of markets while also acknowledging the failures of command-and-control regulation (Dorf and Sabel 1998; de Búrca and Scott 2006). In this respect,

governance regulatory approaches are a form of “meta-risk management” or “meta-regulation” (Parker 2002; Coglianesse and Nash 2006: 14; Parker 2006; Braithwaite 2008; Scott 2008). Although not always successful, meta-risk management when working properly shifts risk and responsibility onto businesses in a way that encourages and incentivizes firms to develop models of self-organization that can also achieve “public goods” and may better ensure compliance with environmental, labor and consumer laws (Ayres and Braithwaite 1992; Sabel et al. 2001; Parker 2002; Lobel 2004; Gunningham and Sinclair 2009). While not all scholars assume that co-regulation and self-regulation always work (Parker 2002; Edelman et al. 2011; Talesh 2009, 2012, 2015), studies that critique novel regulatory arrangements tend to focus on issues of efficacy, feasibility, functionality and implementation (Parker 2002; Nielsen 2006; Marx 2008).

In sum, whereas government command-and-control regulation attempts to structure civil society responses, governance allows private organizations and civil society actors greater involvement and voice in how they will be regulated. In this respect, governance studies place government on an equal level with non-state civic and commercial authorities and affirm its retreat from assuming primacy. The regulatory governance framework recognizes how privatization complements the expansion of new technologies of regulation, meta-regulation and professional self-regulation, and increases delegation to businesses, civil society, and intra-national and international networks of regulatory experts. Unlike command-and-control regulation, governance models decenter regulation away from the state to plural networks of regulation and make businesses responsible to self-regulate to achieve not just financial profits, but policy goals and values (Black 2001; Shamir 2008: 379–383).

BEYOND GOVERNANCE: ORGANIZATIONAL CONSTRUCTIONS OF THE MEANING OF LEGAL REGULATION

For the most part, scholarship on regulatory governance has produced far more empirical research on the rise and character of governance than on its translation into practice (Schneiberg and Bartley 2008). Schneiberg and Bartley note that:

researchers have amassed evidence for the recent proliferation of regulation and new forms at the national and transnational levels. However, they have barely begun to analyze systematically how new forms are translated into practice, leaving scholars with little to say about the extent to which new forms actually reshape markets and organizational behavior on the ground ... [T]heoretical preoccupations in some quarters with adoption, diffusion, and legitimacy [of governance models], can sideline issues of implementation, effectiveness and local impact. (Schneiberg and Bartley 2008: 49)

While the form or design of governance arrangements is well documented, less attention is directed toward how the content and meaning of legal rules are reshaped during their implementation under various governance models. Research elucidating clear specification of mechanisms and processes through which private organizations, state actors and civil society stakeholders shape law and policy within collaborative governance arrangements has proved difficult to gather. This gap flows in part from the

methodological challenges of studying how governance forms shape behavior and legal rules. But this line of research is critical, because regulatory governance prefers to be flexible and vague about what business activity is allowed and what business conduct will be prohibited or limited. Thus, how "law" is interpreted, implemented and constructed in governance models remains a challenge for scholars interested in the relationship between public law and governance. Fortunately, scholars are starting to overcome these methodological challenges.

Some scholars are moving "beyond governance" to understand and examine governance as a process that specifies the institutional and political mechanisms through which private organizations and civil society actors shape the content and meaning of laws (Stryker 1994, 2000; Parker 2002; Stryker 2002; Schofer and McEneaney 2003; Zeitlin 2005; Schneiberg and Clemens 2006; Talesh 2012, 2014). Researchers are exploring what regulatory agencies (state or non-state), businesses and other stakeholders mean by governance and how their attitudes and responses converge, diverge and interact. In particular, these studies highlight how law and compliance are shaped by socially accepted meanings of governance actors, while also highlighting what remains contested and why (Edelman et al. 1993; Lange 1999; Edelman et al. 2001; Parker 2002; Fairman and Yapp 2005; Talesh 2009, 2012, 2014).

Talesh (2012) draws from new-institutional ideas of organizational fields and legal endogeneity to show how institutionalized and competing logics operating among stakeholders and organizations play an important role in determining how consumer warranty law is implemented in alternative dispute resolution systems operating outside courts with various levels of involvement by private organizations, state actors and civil society stakeholders. Despite there being similar formal laws on the books, the law in action operating in different private and state-run lemon law dispute resolution forums is different based on the way business and consumer perspectives are accounted for in each dispute resolution process. Under the single-arbitrator private dispute resolution system run by private organizations with soft state oversight, business values flow into the rules, the procedures and the meaning of law operating in the private dispute resolution system mainly through an extensive training and socialization process for arbitrators. On the other hand, the state-run dispute resolution system consisting of a five-person arbitration board of three citizens, an automotive dealer and a technical expert anchors the neutrality and legitimacy of its dispute resolution structure in a collaborative justice model that balances interested stakeholders reflecting business and consumer logics in a state funded and designed structure. To the extent business values are introduced into the process by the presence of the automotive dealer and technical expert arbitrators on the lemon law board, they seem to be balanced with competing consumer values by the presence of three citizen arbitrators and also the state administrators hired to run the program. Thus, Talesh's analysis of the mechanisms and processes through which governance structures operate and construct what law means suggests that the institutional design and form of the governance structure, in this case the dispute resolution system, have important implications for consumers' access to justice and, more broadly, the civil legal system (Talesh 2009, 2012, 2014).

In the employment law context, Edelman (1992) shows how ambiguity in legal mandates spurs contestation over the meaning of anti-discrimination law. As this occurs, employers and professional advisors construct their own understandings of

what law and compliance mean that are filtered with managerialized values. Ultimately, law becomes an endogenous process as courts defer to the presence of employer policies and procedures as evidence of compliance. Other empirical studies in this vein explore how private organizations shape the meaning of public legal rights in securities regulation (Reichman 1992; Krawiec 2003, 2005; O'Brien 2007), insurance regulation (Schneiberg 1999; Schneiberg and Bartley 2001; Talesh 2014) and criminal justice (Grattet and Jenness 2005). As scholars continue to study the relationship between business and legal regulation, more research is needed to investigate the multiple ways in which institutional and political mechanisms are at play in shaping the meaning of governance arrangements (cf. Stryker 1994, 2000, 2002).

Research on how global governance models are translated into local settings shows that law rarely goes unaltered from one setting to another, instead getting altered via editing and retheorization (Djelic 1998; Campbell 2004; Merry 2006). For example, Carruthers and Halliday (2006) analyze how a model of corporate insolvency law supported by international organizations was partially resisted, incorporated, altered and indigenized as it was exported to China, Indonesia and South Korea. They highlight the iterative nature of implementation and the constitutive cycles of translation and back-translation between the global and the local actors tasked with interpreting and implementing insolvency law and how political, cultural and institutional forces converge. Others have discussed how multiple forms of soft and hard governance often intersect and raise questions concerning the extent to which they undermine or reinforce one another (Sabel and Simon 2006; Trubek and Trubek 2007).

Analyzed collectively, these empirical studies suggest a move toward what I refer to as "beyond governance." In other words, public functions are not simply being devolved to private actors as traditional governance models suggest. Stakeholders are not just more actively participating in policymaking. Rather, private organizations and civil society actors are now driving what constitutes the content and meaning of public legal rights originally created by legislatures, courts and regulatory agencies. Because legislative and regulatory rules are often ambiguous with respect to their meaning, regulatory governance in the context of public law is more of a bottom-up process *emerging* from private organizations and other stakeholders than a top-down process flowing from public legal institutions. Empirical studies in this vein begin moving us away from thinking about governance as a reaction to rational, command-and-control government mandates. Rather, governance models are a framework for exploring how participating stakeholders actively construct the meaning of law and compliance. In doing so, these studies simultaneously encapsulate the institutional logics and political power of organizations, stakeholders and civil society actors.

Looking ahead, continued investigation into the subtle processes by which organizations shape the meaning of compliance is crucial, especially given the rise of regulatory governance and public-private partnerships sanctioned and approved by legislatures, courts and administrative agencies in the past 20 years. As this chapter shows, private organizations are not merely influencing government institutions but instead also performing many traditional government functions—including lawmaking—with state sanction and approval (Braithwaite 1982; Macaulay 1986; Gunningham 1995; Hacker 2002; Kagan et al. 2003; Lobel 2004; Ansell and Gash 2008; Freeman and Minow 2009; Talesh 2009, 2012, 2014). In this respect, future governance studies

should continue to move beyond examining the rise and character of governance forms, to exploring how law itself is constructed, contested and reshaped by private organizations and other civil society actors.

NOTES

1. Majone (1997: 143) explains the subtle link between privatization, deregulation and re-regulation: "The failure of regulation by public ownership explains the shift to an alternative mode of control whereby public utilities and other industries deemed to affect the public interest are left in private hands, but are subject to rules developed and enforced by specialized agencies. Such bodies are usually established by statute as independent administrative authorities—independent in the sense that they are allowed to operate outside the line of hierarchical control by the departments of central government. Thus, the causal link between privatization and statutory regulation provides an important, if partial, explanation of the growth of the regulatory state."
2. Though not the primary focus of public law scholars, concepts of governance have been around for quite a long time (Jaffe 1937).

REFERENCES

- Abbott, K. and D. Snidal (2000), 'Hard and soft law in international governance', *International Organization*, **54** (3), 421–456.
- Albareda, L., J.M. Lozano, A. Tencati, A. Midttun and F. Perrini (2008), 'The changing role of governments in corporate social responsibility: Drivers and responses', *Business Ethics: A European Review*, **17** (4), 347–363.
- Ansell, C. and A. Gash (2008), 'Collaborative governance in theory and practice', *Journal of Public Administration Research and Theory*, **18** (4), 543–571.
- Ayres, I. and J. Braithwaite (1992), *Responsive Regulation: Transcending the Deregulation Debate*, New York: Oxford University Press.
- Bamberger, K. (2006), 'Regulation as delegation: Private firms, decisionmaking, and accountability in the administrative state', *Duke Law Journal*, **56**, 377–468.
- Baumgartner, F.R. and B.D. Jones (1993), *Agendas and Instability in American Politics*, Chicago, IL: University of Chicago Press.
- Becker, G.S. (1983), 'A theory of competition among pressure groups for political influence', *Quarterly Journal of Economics*, **98** (3), 371–400.
- Bernstein, M.H. (1955), *Regulating Business by Independent Commission*, Princeton, NJ: Princeton University Press.
- Bernstein, S. and B. Cashore (2007), 'Can non-state global governance be legitimate? An analytical framework', *Regulation and Governance*, **1** (4), 347–371.
- Bignami, F. (2004a), 'The challenge of cooperative regulatory relations after enlargement', in G. Bermann and K. Pistoer (eds), *Law and Governance in an Enlarged European Union*, Oxford: Hart Publishing, pp. 97–140.
- Bignami, F. (2004b), 'Three generations of participation rights before the European Commission', *Law and Contemporary Problems*, **68** (1), 61–83.
- Black, J. (2001), 'Decentering regulation: Understanding the role of regulation and self-regulation in a "post-regulatory" world', *Current Legal Problems*, **54** (1), 103–146.
- Braithwaite, J. (1982), 'Enforced self-regulation: A new strategy for corporate crime control', *Michigan Law Review*, **80**, 1466–1507.
- Braithwaite, J. (2002), *Restorative Justice and Responsive Regulation*, New York: Oxford University Press.
- Braithwaite, J. (2008), *Regulatory Capitalism: How It Works, Ideas for Making It Work Better*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar.
- Braithwaite, J. and P. Drahos (2000), *Global Business Regulation*, Cambridge: Cambridge University Press.
- Búrca, G. de and J. Scott (eds) (2006), *Law and New Governance in the EU and the US*, Oxford: Hart Publishing.

- Campbell, J.L. (2004), *Institutional Change and Globalization*, Princeton, NJ: Princeton University Press.
- Carruthers, B. and T. Halliday (2006), 'Negotiating globalization: Global scripts and intermediation in the construction of Asian insolvency regimes', *Law and Social Inquiry*, **31**, 521–584.
- Coglianesi, C. (1997), 'Assessing consensus: The promise and performance of negotiated rulemaking', *Duke Law Journal*, **46**, 1255–1349.
- Coglianesi, C. and D. Lazer (2003), 'Management-based regulation: Prescribing private management to achieve public goals', *Law and Society Review*, **37** (4), 691–730.
- Coglianesi, C. and J. Nash (2001), *Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals?*, Washington, DC: Resources for the Future.
- Coglianesi, C. and J. Nash (eds) (2006), *Leveraging the Private Sector: Management-based Strategies for Improving Environmental Performance*, Washington, DC: Routledge.
- Cook, P., C. Kirkpatrick, M. Minogue and D. Parker (eds) (2004), *Leading Issues in Competition, Regulation, and Development*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar.
- Dahl, R. (1961), *Who Governs? Democracy and Power in the American City*, New Haven, CT: Yale University Press.
- Dahl, R. (1967), *Pluralist Democracy in the United States: Conflict and Consensus*, Chicago, IL: Rand McNally.
- Dana, D.A. (2000), 'The new "contractarian" paradigm in environmental regulation', *University of Illinois Law Review*, **2000**, 35–59.
- Djelic, M.L. (1998), *Exporting the American Model: The Postwar Transformation of European Business*, Oxford: Oxford University Press.
- Djelic, M. and K. Sahlin-Andersson (2006), *Transnational Governance: Institutional Dynamics of Regulation*, Cambridge: Cambridge University Press.
- Dorf, M.C. (2003), 'Legal indeterminacy and institution design', *NYU Law Review*, **78**, 875–981.
- Dorf, M.C. and C.F. Sabel (1998), 'A constitution of democratic experimentalism', *Columbia Law Review*, **98**, 267–473.
- Dorf, M.C. and C.F. Sabel (2000), 'Drug treatment courts and emergent experimentalist government', *Vanderbilt Law Review*, **53**, 831–883.
- Edelman, L. (1992), 'Legal ambiguity and symbolic structures: Organizational mediation of civil rights law', *American Journal of Sociology*, **97**, 1531–1576.
- Edelman, L.B., H.S. Erlanger and J. Lande (1993), 'Employers' handling of discrimination complaints: The transformation of rights in the workplace', *Law and Society Review*, **27**, 497–534.
- Edelman, L.B., S. Riggs Fuller and I. Mara-Drita (2001), 'Diversity rhetoric and the managerialization of law', *American Journal of Sociology*, **106** (6), 1589–1641.
- Edelman, L., L. Krieger, S. Eliason, C. Albiston and V. Mellema (2011), 'When organizations rule: Judicial deference to institutionalized employment structures', *American Journal of Sociology*, **117** (3), 888–954.
- Fairman, R. and C. Yapp (2005), 'Enforced self-regulation, prescription, and conceptions of compliance within small businesses: The impact of enforcement', *Law and Policy*, **13**, 73–97.
- Farber, D.A. (1993), 'Revitalizing regulation', *Michigan Law Review*, **91**, 1278–1296.
- Febbrajo, A. and G. Teubner (eds) (1992), *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective*, Milan: Giuffrè.
- Freeman, J. (1997), 'Collaborative governance in the administrative state', *UCLA Law Review*, **45**, 1–77.
- Freeman, J. (2000), 'The private role in public governance', *NYU Law Review*, **75**, 543–652.
- Freeman, J. and M. Minow (eds) (2009), *Government by Contract: Outsourcing and American Democracy*, Cambridge, MA: Harvard University Press.
- Fung, A. and E.O. Wright (eds) (2003), *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance*, London: Verso.
- Grattet, R. and V. Jenness (2005), 'The law-in-between: The effects of organizational perviousness on the policing of hate crime', *Social Problems*, **52** (3), 337–359.
- Gunningham, N. (1995), 'Environment, self-regulation, and the chemical industry: Assessing responsible care', *Law and Policy*, **17** (1), 57–109.
- Gunningham, N. and D. Sinclair (1999), 'Regulatory pluralism: Designing policy mixes for environmental protection', *Law and Policy*, **21** (1), 49–76.
- Gunningham, N. and D. Sinclair (2009), 'Organizational trust and the limits of management-based regulation', *Law and Society Review*, **43** (4), 865–900.
- Gunningham, N., R. Kagan and D. Thornton (2004), 'Social license and environmental protection: Why businesses go beyond compliance', *Law and Social Inquiry*, **29** (2), 307–341.

- Hacker, J. (2002), *The Divided Welfare State: The Battle of Public and Private Social Benefits in the United States*, New York: Cambridge University Press.
- Haines, F. (2009), 'Regulatory failures and regulatory solutions: A characteristic analysis of the aftermath of disaster', *Law and Social Inquiry*, **29**, 307–341.
- Herring, P. (1936), *Public Administration and the Public Interest*, New York: McGraw-Hill.
- Howard-Grenville, J.A. (2005), 'Explaining shades of green: Why do companies act differently on similar environmental issues?', *Law and Social Inquiry*, **30** (3), 551–581.
- Huntington, S.P. (1952), 'The marasmus of the ICC: The Commission, the railroads, and the public interest', *Yale Law Journal*, **61**, 467–509.
- Jacobsson, K. (2004), 'Soft regulation and the subtle transformation of states: The case of EU employment policy', *Journal of European Social Policy*, **14** (4), 355–370.
- Jaffe, L. (1937), 'Law making by private groups', *Harvard Law Review*, **51**, 201–253.
- Jayasuriya, K. (2001), 'Globalization and the changing architecture of the state: The politics of the regulatory state and the politics of negative co-ordination', *Journal of European Public Policy*, **8** (1), 101–123.
- Jordana, J. and D. Levi-Faur (2003), 'The rise of the regulatory state in Latin America: A study of the diffusion of regulatory reforms across countries and sectors', Annual Meeting, American Political Science Association, 28 August.
- Jordana, J. and D. Levi-Faur (2004), 'The politics of regulation in the age of governance', in J. Jordana and D. Levi-Faur (eds), *Politics of Regulation: Institutional and Regulatory Reform in the Age of Governance*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, pp. 1–30.
- Kagan, R., N. Gunningham and D. Thornton (2003), 'Explaining corporate environmental performance: How does regulation matter?', *Law and Society Review*, **37** (1), 51–90.
- Kamieniecki, S. (2006), *Corporate America and Environmental Policy: How Does Business Get Its Way?*, Stanford, CA: Stanford University Press.
- Kingdon, J. (1984), *Agendas, Alternatives, and Public Policies*, 2nd edn, New York: Harper Collins.
- Kolko, G. (1965), *Railroads and Regulations*, Princeton, NJ: Princeton University Press.
- Kooiman, J. (1993), 'Findings, speculations and recommendations', in J. Kooiman (ed.), *Modern Governance: New Government–Society Interactions*, London: Sage, pp. 249–262.
- Krawiec, K. (2003), 'Cosmetic compliance and the failure of negotiated governance', *Washington University Law Review*, **81**, 487–544.
- Krawiec, K. (2005), 'Organizational misconduct: Beyond the principal–agent model', *Florida State University Law Review*, **32**, 571–615.
- Lange, B. (1999), 'Compliance construction in the context of environmental regulation', *Social and Legal Studies*, **8** (4), 549–567.
- Leech, B., F.R. Baumgartner, J.M. Berry, M. Hojnacki and D.C. Kimball (2002), 'Organized interests and issue definition in policy debates', in A. Cigler and B. Loomis (eds), *Interest Group Politics*, Washington, DC: CQ Press.
- Levi-Faur, D. (2005), 'Global diffusion of regulatory capitalism', *Annals of the American Academy of Political and Social Science*, **598**, 12–32.
- Liebman, J.S. and C.F. Sabel (2003), 'A public laboratory Dewey barely imagined: The merging model of school governance and legal reform', *NYU Review of Law and Social Change*, **28**, 183–304.
- Lindblom, C.E. (1977), *Politics and Markets: The World's Political-Economic Systems*, New York: Basic Books.
- Lobel, O. (2004), 'The renew deal: The fall of regulation and the rise of governance in contemporary legal thought', *Minnesota Law Review*, **89**, 262–390.
- Macaulay, S. (1986), 'Private government', in L. Lipson and S. Wheeler (eds), *Law and the Social Sciences*, New York: Russell Sage Foundation, pp. 445–518.
- Majone, G. (1994), 'The rise of the regulatory state in Europe', *West European Politics*, **17** (3), 77–101.
- Majone, G. (1997), 'From the positive to the regulatory state: Causes and consequences of changes in the mode of governance', *Journal of Public Policy*, **17** (2), 139–167.
- Manzetti, L. (ed.) (2000), *Regulatory Policy in Latin America: Post-privatization Realities*, Miami, FL: North–South Center Press.
- Marx, A. (2008), 'Limits to non-state market regulation: A qualitative comparative analysis of the international sport footwear industry and the Fair Labor Association', *Regulation and Governance*, **2** (2), 253–273.
- Merry, S.E. (2006), *Human Rights and Gender Violence: Translating International Law into Local Justice*, Chicago, IL: University of Chicago Press.

- Michael, D.C. (1996), 'Cooperative implementation of federal regulations', *Yale Journal on Regulation*, **13**, 535–601.
- Mills, C.W. (1956), *The Power Elite*, New York: Oxford University Press.
- Minow, M. (ed.) (2002), *Partners, Not Rivals: Privatization and the Public Good*, Boston, MA: Beacon Press.
- Morgan, B. (1999), 'Regulating the regulators: Meta-regulation as a strategy for reinventing government in Australia', *Public Management*, **1** (1), 49–66.
- Nielsen, V.L. (2006), 'Are regulators responsive?', *Law and Policy*, **28** (3), 395–416.
- O'Brien, J. (2007), 'Introduction: The dynamics of capital markets governance', in J. O'Brien (ed.), *Private Equity, Corporate Governance and the Dynamics of Capital Market Regulation*, London: Imperial College Press, pp. 1–18.
- O'Rourke, D. (2003), 'Outsourcing regulation: Analyzing non-governmental systems of labor standards and monitoring', *Policy Studies Journal*, **31** (1), 1–29.
- Parker, C. (2002), *The Open Corporation: Effective Self-regulation and Democracy*, Cambridge: Cambridge University Press.
- Parker, C. (2006), 'The "compliance" trap: The moral message in responsive regulatory enforcement', *Law and Society Review*, **40** (3), 591–622.
- Parker, C. and V. Nielsen (2009), 'The challenge of empirical research on business compliance in regulatory capitalism', *Annual Review of Law and Social Sciences*, **5**, 45–70.
- Parker, C. and V. Nielsen (2011), *Explaining Compliance: Business Responses to Regulation*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar.
- Peters, B.G. (1996), *The Future of Governing: Four Emerging Models*, Lawrence: University Press of Kansas.
- Polsby, N. (1963), *Community Power and Political Theory*, New Haven, CT: Yale University Press.
- Posner, R.A. (1974), 'Theories of economic regulation', *Bell Journal of Economics and Management Science*, **5** (2), 335–358.
- Quirk, P.J. (1981), *Industry Influence in Federal Regulatory Agencies*, Princeton, NJ: Princeton University Press.
- Reichman, N. (1992), 'Moving backstage: Uncovering the role of compliance in shaping regulatory policy', in K. Schlegel and D. Weisburd (eds), *White Collar Crime Reconsidered*, Boston, MA: Northeastern University Press, pp. 244–268.
- Sabel, C.F. and W.H. Simon (2004), 'Destabilizing rights: How public law litigation succeeds', *Harvard Law Review*, **117**, 1015–1101.
- Sabel, C.F. and W.H. Simon (2006), 'Epilogue: Accountability without sovereignty', in G. de Búrca and J. Scott (eds), *Law and New Governance in the EU and US*, Oxford: Hart Publishing, pp. 395–412.
- Sabel, C., A. Fung and D. O'Rourke (2001), 'Stepping up labor standards', *Boston Review*, **26** (1), 4–20.
- Salaman, L.M. (1995), *Partners in Public Service: Government–Nonprofit Relations in the Modern Welfare State*, Baltimore, MD: Johns Hopkins University Press.
- Schneiberg, M. (1999), 'Political and institutional conditions for governance by association: Private order and price controls in American fire insurance', *Politics and Society*, **27** (1), 67–103.
- Schneiberg, M. and T. Bartley (2001), 'Regulating American industries: Markets, politics, and the institutional determinants on fire insurance regulations', *American Journal of Sociology*, **107** (1), 101–146.
- Schneiberg, M. and T. Bartley (2008), 'Organizations, regulation, and economic behavior: Regulatory dynamics', *Annual Review of Law and Social Sciences*, **4**, 31–61.
- Schneiberg, M. and E.S. Clemens (2006), 'The typical tools for the job: Research strategies in institutional analysis', *Sociological Theory*, **24** (3), 195–227.
- Schofer, E. and E. McEneaney (2003), 'Methodological tools for the study of globalization', in G. Drori, J. Meyer, F. Ramirez and E. Schofer (eds), *Science in the Modern World Polity: Institutionalization and Globalization*, Stanford, CA: Stanford University Press, pp. 43–74.
- Scott, C. (2008), 'Reflexive governance, meta-regulation and corporate social responsibility: The Heineken effect', in N. Boeger, R. Murray and C. Villiers (eds), *Perspectives on Corporate Social Responsibility*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, pp. 170–185.
- Shamir, R. (2008), 'Corporate responsibility: Towards a new market-embedded morality?', *Theoretical Inquiries in Law*, **9** (2), 371–394.
- Shamir, R. (2010), 'Capitalism, governance and authority: The case of corporate social responsibility', *Annual Review of Law and Social Sciences*, **6**, 531–553.
- Shapiro, M. (1988), *Who Guards the Guardians?*, Athens: University of Georgia Press.

- Sigler, J.A. and J.E. Murphy (1988), *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion*, New York: Quorum Books.
- Sigler, J.A. and J.E. Murphy (1991), *Corporate Lawbreaking and Interactive Compliance: Resolving the Regulation-Deregulation Dichotomy*, New York: Quorum Books.
- Simpson, S.S. (1992), 'Corporate-crime deterrence and corporate-control policies: Views from the inside' in K. Schlegel and D. Weisburd (eds), *White-collar Crime Reconsidered*, Boston, MA: Northeastern University Press, pp. 289-308.
- Simpson, S.S. (1998), *Why Corporations Obey the Law*, New York: Cambridge University Press.
- Stewart, R. (1986), 'Reconstitutive law', *Maryland Law Review*, **46**, 86-114.
- Stigler, G.J. (1971), 'The theory of economic regulation', *Bell Journal of Economics and Management Science*, **2**, 3-21.
- Streeck, W. and K. Thelen (2004), 'Introduction: Institutional change in advanced political economies', in W. Streeck and K. Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies*, New York: Oxford University Press, pp. 1-39.
- Stryker, R. (1994), 'Rules, resources, and legitimacy processes: Some implications for social conflict, order, and change', *American Journal of Sociology*, **99** (4), 847-910.
- Stryker, R. (2000), 'Legitimacy processes as institutional politics: Implications for theory and research in the sociology of organizations', *Research in the Sociology of Organizations*, **17**, 179-223.
- Stryker, R. (2002), 'A political approach to organizations and institutions', *Research in the Sociology of Organizations*, **19**, 169-193.
- Sturm, S. (2001), 'Second generation employment discrimination: A structural approach', *Columbia Law Review*, **101**, 458-568.
- Talesh, S. (2009), 'The privatization of public legal rights: How manufacturers construct the meaning of consumer law', *Law and Society Review*, **43** (3), 527-562.
- Talesh, S. (2012), 'Insurance law as public interest law', *UC Irvine Law Review*, **2**, 985-1009.
- Talesh, S. (2014), 'Institutional and political sources of legislative change: Explaining how private organizations influence the form and content of consumer protection legislation', *Law and Social Inquiry*, **39** (4), 973-1005.
- Talesh, S. (2015), 'Rule-intermediaries in action: How state and business stakeholders influence the meaning of consumer rights in regulatory governance arrangements', *Law and Policy*, **37**, 1-31.
- Terry, L. (1998), 'Administrative leadership, neo-managerialism, and the public management movement', *Public Administration Review*, **58** (3), 194-200.
- Teubner, G. (1986), 'After legal instrumentalism? Strategic models of post-regulatory law', in G. Teubner (ed.), *Dilemmas of Law in the Welfare State*, Milan: Giuffrè, pp. 299-326.
- Trubek, D.M. and L.G. Trubek (2004), 'Hard and soft law in the construction of social Europe: The role of the open method of coordination', *European Law Journal*, **11** (3), 343-364.
- Trubek, D.M. and L.G. Trubek (2007), 'New governance and legal regulation: Complementarity, rivalry or transformation', *Columbia Journal of European Law*, **13**, 539-564.
- Tyler, T.R. (1990), *Why People Obey the Law*, New Haven, CT: Yale University Press.
- Unger, R.M. (1998), *Democracy Realized: The Progressive Alternative*, London: Verso.
- Vaughan, D. (1998), 'Rational choice, situated action, and the social control of organizations', *Law and Society Review*, **32** (1), 23-61.
- Vogel, D. (1989), *Fluctuating Fortunes: The Political Power of Business in America*, New York: Basic Books.
- Vogel, D. (1995), *Trading Up: Consumer and Environmental Regulation in a Global Economy*, Cambridge, MA: Harvard University Press.
- Vogel, S.K. (1996), *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries*, Ithaca, NY: Cornell University Press.
- Zeitlin, J. (2005), 'The open method of coordination in action: Theoretical promise, empirical realities, reform strategy', in J. Zeitlin and P. Pochet (eds), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies*, Brussels: PIE-Peter Lang, pp. 214-245.