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Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century

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Abstract

Current scholarship suggests that instead of fueling deregulation and a race to the bottom, globalization and neoliberalism often go hand in hand with the expansion of regulatory rules and agents. We survey efforts to address this paradox. Building on analyses of nineteenth- and twentieth-century regulation, research on the current period has produced two critical analytical advances. It has developed new, multilevel conceptions of globalization, international interdependence, and their effects on regulation. Moreover, in grappling with new regulatory experiments, research has moved beyond command and control to reconceptualize regulation as an institutional form. Yet in its haste to understand the new century, this research has barely begun to produce systematic analyses of whether and how new forms are translated into practice and shape organizational behavior. It also assumes discontinuity between new forms and their bureaucratic predecessors, leaving unexplored how concepts developed for the new century can shed new light on pre-twenty-first-century forms. We propose strategies for future research on both these fronts.

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Whereas the nineteenth and twentieth centuries produced ample opportunities for analyzing the regulation of industries, studying it in the twenty-first century might at first seem like an exercise in diminishing returns. The twentieth century witnessed the dramatic growth of economic regulation (control over rates and entry) and social regulation (consumer and workplace safety, environmental standards). With these developments came research on regulation spanning the fields of economics, political science, sociology, and law. But with the triumph of neoliberalism, it is deregulation and diminished state capacities that appear to characterize contemporary capitalism, driven by globalization, mobile capital, and the harsh disciplines of international competition. The victory of markets over states would seem certain.

Yet current research finds that a paradox better characterizes the new millennium. Globalization, privatization, and neoliberalism may go hand in hand with the expansion of regulation, both within nations and at the transnational level. Captured by Stephen Vogel in the title of his 1996 book, *Freer Markets, More Rules* seems to be the new century's central tendency. This has generated both new phenomena for study and efforts to revise traditional conceptions of regulation and its effects on organizational behavior. We selectively survey these efforts, taking a historical approach.

In the next section, or Prelude, we examine scholarship on regulation in the American economy. The United States is a source of regulation as an institutional form, and debates over nineteenth- and twentieth-century regulation between Chicago school economists and their critics powerfully frame research on the current period. These debates moved beyond corporate capture to rethink relations among markets, politics, and regulation, laying foundations for understanding recent developments. They prompted researchers to consider a broader range of state and nonstate actors, to incorporate the role of ideas, experts, and professionals, and to explore how institutions and state structures intersect with regulatory politics. Yet these debates also sustained imageries that are ill suited to tackling the current conjunction of globalization and regulatory expansion. They remained focused on domestic and sectoral determinants of regulation. Moreover, they frequently equated regulation as a form with the state, bureaucratic enforcement, and (inefficient) constraint, thus reinforcing classical antinomies of states versus markets.

In the subsequent two sections, on Globalization, Neoliberalism, and Regulatory Resurgence and on New Regulatory Forms, we consider how current regulatory growth reoriented research along both these fronts. First, we trace how analyses of interdependence spawned multilevel images and new arguments about regulation. Initially, such analyses deepened the puzzle of how regulation and globalization could coexist, with race to the bottom (RTB) arguments asserting that nation-states would have to reduce taxes, deregulate markets, and dismantle themselves to sustain investment. Yet against this new orthodoxy, scholars developed three new conceptions of global interdependence and its links to regulation: (*a*) a trading up dynamic rooted in market forces, (*b*) dynamics of diffusion and affiliation that spread regulation across nations, and (*c*) structuration at the transnational level that created new arenas and platforms for regulation.

Second, we trace how regulatory experiments and a perceived crisis of command have led researchers to reconceptualize regulation as an institutional form, moving scholarship increasingly beyond the bureaucratic state. This work includes numerous discussions of smart regulation, soft law, market-driven governance, flexible styles of enforcement, and deliberative systems of benchmarking and peer review (e.g., Cohen & Sabel 1997, Gunningham & Grabosky 1998, Piore & Schrank 2006). To organize this rather disjointed literature, we identify central axes of innovation and highlight several prominent forms that reconfigure relationships between rulemaking, regulators, and the regulated in distinct ways.

Although retheorizing interdependence and regulatory form substantially expanded the conceptual repertoire for analyzing current

developments, unresolved issues remain, which we consider in the final section. First, 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. We propose several strategies along these lines, drawing on recent scholarship on law and organization.

Second, researchers often assume discontinuity between twenty-first-century regulation and its Fordist bureaucratic predecessors. Yet looking backward through the lens of emerging research may reveal more of the new in the old than visions of crisis and break would suggest. Discoveries of new phenomena may be partly artifacts of changing analytical approaches (and the prior neglect of heterodox theories). Furthermore, avenues for research may exist for using current theoretical advances to reanalyze historical cases. New forms might be found in the nineteenth and twentieth centuries, and old regulatory forms might have arisen from transnational crossings, postmodern multilevel processes, and diffusion across states.

PRELUDE: THEORY AND DEBATE OVER AMERICAN REGULATION IN THE NINETEENTH AND TWENTIETH CENTURIES

Research on the current period often takes the U.S. case as its point of departure, treating the American model of regulation that arose during the nineteenth and twentieth centuries as both the wellspring of regulatory capitalism and the basis for theorizing regulation's emergence and effects. This American model is exemplified by independent regulatory agencies like the Interstate Commerce Commission (ICC) and the Environmental Protection Agency (EPA). Beginning in the 1960s, such agencies became the subject of debates between economic—or capture-cartel—theories and their critics, which shaped scholarly imageries of regulation, framed the U.S. case, and produced the intellectual context for recent work.

Articulated first by Kolko's (1965) and MacAvoy's (1965) classic historical studies of regulation, and later by Chicago school economists, capture-cartel theory rejects claims that regulation emerges to solve market failures or protect the public from predatory corporate behavior. Instead, "as a rule, regulation is acquired by the industry, and designed and operated primarily for its benefit" (Stigler 1971, p. 3), that is, to control competition, stabilize monopoly, and benefit regulated firms at consumers' expense (Jordan 1972; Posner 1971, 1974; Stigler 1974). Firms try to control competition on their own, via mergers or interfirm compacts. But such efforts run afoul of problems of free riding, enforcement, and entry, particularly in sectors characterized by a large number of diverse, heterogeneous, and geographically dispersed firms (Meier 1988, Posner 1974, Wilson 1980). In these cases, firms will turn from cartels to capture, using their resources and political clout to harness state coercion to control entry, limit the growth of new firms, suppress substitutes, subsidize complements, and impose price controls.

Thus, the railroads' persistent failure to control rebating and competition for long-haul traffic through pools and mergers is what led railroad men to seek federal regulation and fueled the rise of the ICC (Kolko 1965, MacAvoy 1965). Formed in 1887, the ICC helped stabilize railroad profits, using its expanding authority to ensure reasonable and just rates, prevent short-/long-haul rate discrimination, set minimum/maximum rates, and sanction rebates (Berk 1994, Dobbin 1994, McCraw 1984). Similarly, private electrical utility corporations designed the system of public utility regulation from 1905 to 1915, a system that helped corporate utilities end rivalries, institute exclusive franchises and natural monopoly, ensure reasonable rates based on capital valuation, and handicap publicly owned electricity providers (Anderson 1981, McGuire 1989, Troesken 1994).

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The economic theory provided a distinct vision of the effects of regulation and the relation between regulation and regulated organizations: Regulation was a system of public, bureaucratic coercion deliberately sought by firms to consolidate cartelization and market power. It prevented price competition and limited entry, inducing inefficiencies, nonprice competition, and tendencies toward high costs and overcapitalization (Joskow & Noll 1977, Joskow & Rose 1989). And it fueled the expansion of regulatory coalitions, creating new economic interest groups as labor, supplier, or privileged consumer segments captured some of the rents of price control (Noll 1989, Noll & Owen 1983).

The economic theory sparked debates over historical cases that challenged its core claims (McCraw 1975). Moreover, neither deregulation nor the new social regulation in safety, environmental, consumer, or civil rights protection fit easily with imageries of corporate capture and industry interests in controlling competition (Derthick & Quirk 1985, Peltzman 1989, Vogel 1981). Instead, analyses of economic and social regulation raised questions about how industry outsiders might prevail over corporate interests and how noneconomic contextual factors might shape those contests—prompting three theoretical developments.

The first involved a shift toward pluralist, interest group conceptions of regulation, broadening the range of groups and organizations on the analytical agenda. For Sklar (1988) and Sanders (1990), the Federal Trade Commission emerged as a settlement of political struggles over the rise of the corporation, in which anticorporate social movements of small business, agrarians, and independent producers accepted the new order in exchange for public controls on corporations. Industry studies likewise found that regulation was sometimes pressed on firms over their opposition, as a condition for political peace, or served other interests, including shippers and trade or business groups seeking to foster development (Berk 1994; Dobbin 1994; Kanazawa & Noll 1994; McCraw 1975, 1984; Schneiberg & Bartley 2001). So did research on social regulation, which traced interventions to mobilization by civil rights, environmental, and consumer movements and the explosion of not-for-profit public interest groups (Edelman 1990, Vogel 1981). But the shift toward pluralism was partly an elaboration of economic theory (Noll 1983, Wilson 1980): Scholars argued that cartel-capture dynamics are most likely when the benefits of regulation fall to a small number of homogeneous firms and its costs are spread over a large number of heterogeneous and dispersed consumers or suppliers with low per capita stakes in an industry. However, where costs and benefits are concentrated, or consumer and supplier groups are homogeneous and concentrated, regulatory politics will be more contested, with outcomes reflecting compromises among interests. And where benefits are diffuse, policy entrepreneurs may emerge to represent or organize dispersed interests in (de)regulatory coalitions.

Second, debates over economic theory reconsidered the antimonies between state and competitive markets. This began with a revival of market failure arguments. These were first introduced as an alternative reason that firms might seek regulation—e.g., to safeguard transaction-specific investments from expropriation—and then as a way to extend interest group arguments by considering positive sum foundations for regulatory coalitions (Fishback & Kantor 1998; Goldberg 1976; Schneiberg 1999, 2005). Political economists and sociologists took this idea further, arguing that markets, in general, require state regulation to define property rights, fix rules of competition, specify appropriate governance forms, and otherwise facilitate development (Abolafia 1996, Campbell & Lindberg 1990, Fligstein 2001, North 1990, Streeck 1997). Returning to the railroad case, Berk (1994), Dobbin & Dowd (2000), and Dunlavy (1994) find that autonomous corporations and a competitive market were not the state of nature. Rather, they were late developments, produced through state regulation of rates, trusts, bankruptcy processes, and capital flows. Far from stifling

growth, regulation in some forms fostered enterprise creation (Dobbin & Dowd 1997).

The third development fueled by debates over economic theory looked more broadly at the institutional environments within which regulatory actors and processes operate. One line of work highlighted the power of controversy and legitimacy crises to disrupt power relations and render entrenched interests vulnerable to challenge (Baumgartner & Jones 1993, Meier 1988, Schneiberg & Bartley 2001). Crises and public scrutiny can arise from various sources (e.g., a nuclear power plant accident or the publication of automobile safety problems) and can unfold in investigations, hearings, court cases, and the popular press. But once underway, they become windows for outsiders and policy entrepreneurs to gain access to policymaking, frame industry practices as violating fairness and rationality, and put corporations on the defensive.

A related line of work on regulatory environments highlighted the influence of ideas, expert theory, and the professions. Prevailing ideas shape the diagnosis of regulatory problems and provide participants with symbolic resources for contestation (Campbell 1998, Dobbin 1994, Fligstein 2001, Hall 1992, Stryker 2000). In the equal employment case, advocates of the Philadelphia plan to subject federal contractors to race-based hiring were able to overcome opponents' objections to quotas and preferential treatment by mobilizing principles of equality of opportunity and the language of existing employment rights law to recast the plan (Pedriana & Styker 1997). Moreover, as authoritative producers of ideas, expert professions play a central role in defining situations, regulatory options, and their costs and benefits for officials and key publics. As Derthick & Quirk (1985) documented, economists helped decisively to delegitimate price and entry controls and promote deregulation in the United States; the theorists advocated reform in public hearings, and the economic theory provided congressional reformers and consumer advocates with symbolic resources to advance their claims. More generally, economists have used their professional standing to advocate promarket policies here and abroad, while also reshaping access and power by introducing new methods into regulatory processes, such as cost-benefit analysis (Espeland & Vannebo 2007, Fourcade-Gourinchas & Babb 2002). Similarly, lawyers and human resource professionals vied to define the meaning of civil rights legislation for employers, profoundly shaping the character of American employment regulation (Dobbin & Kelly 2007, Edelman et al. 1999).

A final line of work on regulatory environments addressed how institutions influence regulatory politics by shaping actors' interests and organizing capacities or by structuring access and veto points (Hall & Taylor 1996, Schneiberg & Clemens 2006, Thelen 1999). Placing the American case in a cross-national comparative context, this work sometimes returned to the classic railroad case. For Skowronek (1982), American political institutions—first, the zealous judicial review and party machines, and later, the conflicts among branches of the federal government—prevented the development of a professionally staffed, expert administration for regulating railroads, thus hamstringing the ICC and leaving farmers, merchants, and industrialists unsatisfied (see also Dunlavy 1994). For Dobbin (1994), officials, railroads, and other participants designed and debated measures for regulation through visions of order read from American political institutions, which located sovereignty in local communities and competitive markets and cast the concentration of power as the greatest threat to liberty. This context precluded both French statism and British self-regulation via cartels, leading architects to an adjudicative model with independent commissions serving as the referee-enforcer of price-competitive markets. Furthermore, as Vogel's (1986) cross-national study shows, this American style carried over into social regulation. Operating in an open political system characterized by multiple access points, the rule of law, distrust of power monopolies, and the proliferation of public advocacy groups, U.S.

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regulatory commissions eschewed collaboration and informality for a bureaucratized, legalistic, and adversarial approach based in formal hearings, detailed rules, and lawsuits against violators—a style Kagan (2001) famously called "adversarial legalism."

Overall, research inspired by economic theory and the United States case tilled rich intellectual soil for work on twenty-first-century regulation. It looked beyond industries to provide images of regulatory environments populated by social movements, nonprofit organizations, expert professions, and state agencies with their own agendas. It produced an expanded conception of regulatory processes, moving beyond capture to consider the effects of ideas, institutions, the mobilization of experts, and legitimacy crises. It also drew fruitful lines of debate both among economic, political, and social constructionist accounts of regulation and between those who see regulation as rent seeking and those who see it as a basic condition for markets.

Yet the debate over regulation retained some key assumptions of economic theory. It treated regulating units as largely independent entities and regulation as a response to industry or domestic political conditions. It also continued to identify regulation with the state, and state regulation with bureaucratic rulemaking systems, especially in the American case. There were heterodox approaches. Political economists and comparativists argued that private interest governments, collective self-regulation, and private forms of authority were third ways between market and state and could contribute positively to economic performance (Atkinson & Coleman 1985, de Vroom 1985, Streeck & Schmitter 1985). These analytical undercurrents foreshadowed recent conceptions of regulatory form, yet they were not fully absorbed into the mainstream. Thus, although research on the nineteenth and twentieth centuries reconsidered market failures and rejected simple imageries of producer dominance, it did not fully shake off the classical antimonies of state and market, or regulation and competition. Rather, it remained beholden in many cases to realist imageries of regulation as an impediment to competitiveness, efficiency, and growth. These were analytical stances that research on twenty-first-century regulation would first carry forward and then reconsider and revise.

GLOBALIZATION, NEOLIBERALISM, AND REGULATORY RESURGENCE IN THE TWENTY-FIRST CENTURY

Analyzing regulation in the context of globalization and neoliberalism has produced a sprawling body of scholarship spanning diverse fields. The fundamental insight of this research is that regulatory outcomes in any particular nation rest not just on industry or domestic conditions, but also on the regulatory acts of other nations. Research on the new century has crafted four images of globalization to understand this interdependence and its effects.

Interdependence as a Race to the Bottom

The twenty-first century first looked like the century of unqualified deregulation. Economists had joined consumer advocates to delegitimate economic regulation in the United States, and then joined with international organizations to spread the gospel of markets, privatization, liberalization, and shock therapy. Moreover, increasing economic interdependence among nations seemed to accelerate deregulation, leaving little if any room for the political control of capitalism. In what became a baseline for later work, one conception of globalization emphasized how increased capital mobility would generate a "race to the bottom" (RTB) in regulatory standards, whether for financial controls (Goodman & Pauly 1993), labor standards (Chan & Ross 2003), or environmental protection (Daly & Cobb 1994). By this account, the ability of companies and investors to exit one national economy for another with

fewer regulatory burdens creates a downward spiraling competition in laxity, as governments lower their standards to attract or retain investment and companies engage in regulatory arbitrage across borders. Even the mere threat of exit or capital flight could have a chilling effect on regulation, with globalization amplifying what an earlier generation of scholars had discussed, primarily in domestic contexts, as the structural power or privileged position of business (Block 1977, Lindblom 1977; see also Guillén 2001). RTB theorists thus expect liberalized trade to decrease regulation, with formerly strong standards being "competed down to the level that rules in overpopulated Third World countries" (Daly & Cobb 1994, p. 221) and with fierce competition among developing countries precluding any effective regulation there (Chan & Ross 2003).

RTB claims have some empirical support. Economic integration lowers corporate tax rates (Bretschger & Hettich 2002, Clausing 2007, Rodrik 1997). Trade intensity (as distinguished from foreign direct investment) is associated with downgrading labor rights in developing countries (Mosley & Uno 2007), and globalization in the shipping industry has fostered flagging standards and a race to the regulatory middle in safety, environmental, and labor standards (DeSombre 2006). Laxity in pollution regulation appears to attract trade and facility location, although this fails to yield a full-scale race to pollution havens (Copeland & Taylor 2004). Furthermore, the international trade in hazardous waste allows industries to practice regulatory arbitrage without actually migrating their facilities (Clapp 2002).

Yet full-scale races to the bottom are relatively rare, and upward trajectories of regulation are common (Braithwaite & Drahos 2000, Vogel & Kagan 2004). Laxity in pollution regulation may affect investment, but it does not dominate investment decisions (Copeland & Taylor 2004). In fact, environmental regulation has become progressively stricter in the past three decades—for North American and European nations and for major exporters among developing nations (Vogel 1995)—and EPA-style environmental ministries have emerged in unexpected places (Frank et al. 2000). Consumer regulatory agencies in Europe have separated risk assessment from management, rendering the former less vulnerable to capture, and have adopted precautionary principles that allow drug or food bans in advance of fully confirmed cause-effect relations (Vogel 2003). Foreign direct investment is associated with upgrading of labor rights in developing countries (Mosley & Uno 2007) and may improve environmental performance (Garcia-Johnson 2001). In the realm of finance, dominant financial centers' adoption of stricter capital adequacy requirements and accounting standards for public offerings has prompted other nations to follow suit (Simmons 2003).

Market Dynamics of Trading Up

Such observations have underwritten challenges to the RTB model that retheorize the links between globalization and regulation. In one effort, David Vogel and colleagues (Vogel 1995, Vogel & Kagan 2004) argue that economic integration can create pressures to raise, rather than lower, regulatory standards via a race-to-the-top dynamic of trading up grounded in the power of large consumer markets with stringent standards (such as the United States and Europe). Firms in less-regulated jurisdictions seeking to export to those markets must meet their stringent requirements. Once firms invest in meeting the higher bar, they may develop interests in their home country's adopting similarly stringent regulation, so they can exploit economies of scale and gain competitive advantages over domestic rivals. These dynamics are akin to the California effect, in which auto emissions standards set for the California market become de facto standards for other states, and they stand in contrast to the Delaware effect, named for that state's inducing competition in laxity for corporation law.

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Moreover, trading up may be supported by political coalitions between "Baptists" (environmental and consumer advocates) and "bootleggers" (firms that expect to profit from stricter standards) that push to upgrade and export regulation. Just as moral crusaders and black market entrepreneurs converged in support of alcohol prohibition in early twentieth-century America, coalitions of humanitarians and profit-seekers or "the green and the greedy" (Maxwell & Briscoe 1997, p. 285) have ratcheted up national regulations for hazardous chemicals and food safety (Vogel 1995). For example, at the international level, DuPont Corporation's early investment in alternatives to chlorofluorocarbons made it a supporter of the Montreal Protocol on ozone depletion (Oye & Maxwell 1994).

Reconceptualizing economic interdependence as a source of regulatory expansion has inspired research and debate on the cases and scope conditions for trading up (Braithwaite & Drahos 2000, Vogel & Kagan 2004). The California effect appears to depend on whether harmonized stringency is compatible with the interests of powerful governments (Drezner 2007, Simmons 2003), whether international organizations or collectivities of nations have the capacity to exclude laggards from lucrative markets (DeSombre 2006), and whether regulated industries rely heavily on laxity and arbitrage (and therefore resist stringency) (Murphy 2004). Scholars also suggest that the California effect applies more directly to product standards (e.g., auto emissions, appliance energy efficiency) than to standards for production process (e.g., labor standards, industrial pollution control) (Swire 1996), as the latter may be indistinguishable to users and violate free trade rules. Yet, the product-process distinction is blurry and contested (e.g., data privacy rules), and World Trade Organization rulings have sometimes allowed protective regulations to influence production methods (e.g., protection of sea turtles in shrimping) (DeSombre & Barkin 2002, Howse & Regan 2000). Even as a partial account, trading up has usefully challenged globalization orthodoxy and provided one explanation for positive associations between globalization and regulation.

Privatization and the Diffusion of Regulation

Research on regulated industries poses a second challenge to RTB, providing different imageries of global interdependence and its effects on regulation. Here, too, globalization, liberalization, and regulation have gone hand in hand. Ministries in Japan, France, and Germany enhanced regulatory control over telecommunications and finance as those industries privatized or liberalized (Vogel 1996). Even Great Britain, that pioneer of the market, formed 12 major new regulatory agencies from 1984 to 1993 and followed its big-bang liberalization with a Financial Services Authority that concentrated power over financial markets in a centralized, state-controlled hierarchy (Moran 2003, pp. 76–79; Vogel 1996, pp. 129–33). From 1980 to 2002, roughly 70 countries created independent regulatory authorities for their newly privatized electricity industries, and almost 120 countries did so in telecommunications (Levi-Faur 2005; see also Henisz et al. 2005). Nearly every Western European nation created regulatory authorities for electricity, telecoms, finance, and competition policy; at least half did so for food and pharmaceuticals (Gilardi 2005). Latin American nations tripled the number of regulatory agencies supervising banking, electricity, gas, telecom, food, and other sectors in the same period (Jordana & Levi-Faur 2005).

For researchers wrestling with this paradox, regulatory expansion was partly a pragmatic response to sectoral conditions made salient by neoliberalism, globalization, and privatization. Making markets in newly privatized and liberalized industries required new interventions to promote entry, ensure access to interconnection, fix terms of competition, prevent newly privatized firms from engaging in restrictive practices, and manage political conflicts over local control and universal service (Bartle

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2002, Levi-Faur 2005, Vogel 1996). Regulatory expansion was also a path-dependent product of domestic conditions, a response to globalization that was mediated or driven by national institutions and politics (Humphreys & Padgett 2006, Jordana et al. 2006). In Japan, ministries strategically reregulated electricity, finance, telecom, and broadcasting, using slow and incremental liberalization and privatization to preserve their role in the economy, sustain their commitments to domestic industry, and manage threats to their authority by developing new powers over licensing (Vogel 1996). Regulatory expansion in Britain was likewise a response to globalization filtered by domestic politics and institutions, taking a path set by the legacies—and collapse—of "club self-government" and the Victorian political settlement (Moran 2003; see also Vogel 1996). Invoking imperatives of globalization, Thatcherites used liberalization and the creation of independent regulators to reposition Britain as a global financial center and displace club rule with formalized institutions of high modernism that maximized firms' exposure to international competition. But in so doing, they exposed industry governance to democratic pressures, deepening distrust and fueling highly politicized episodes of regulatory hyperinnovation (Power 1997).

Yet the more radical step here is to reconceive globalization and interdependence as sociocultural processes of diffusion, emulation, and network formation. Drawing on world society arguments, scholars root the twenty-first-century rise of regulatory capitalism in horizontal processes of international diffusion and policy transfer, which they distinguish from bottom-up explanations based on domestic conditions and top-down accounts based on Europeanization or conditionality requirements of international organizations (Jordana & Levi-Faur 2004, 2005; Lazer 2005; Levi-Faur 2005; Henisz et al. 2005). Regulatory solutions in North American and then European countries helped crystallize a model—based on independent regulatory authority as the rational method for organizing private infrastructure—that was reinforced and diffused through lateral relations, observation and mutual regard, and increasingly shared understandings among regulators and national officials. As more nations adopt this model, the independent regulatory authority becomes increasingly institutionalized, increasing pressures on countries to follow suit as they privatize or liberalize industries (Meseguer 2005). Globalization directly fuels regulation, in this view, as it entails growing social interdependence, with regulators and privatized industries increasingly entangled in a community of practice with its own status orders and sanctioned ideals. Indeed, research sensitive to such dynamics advances similar claims for closely related regulatory reforms, notably the diffusion of new public management (Christensen & Laegreid 2001, Sahlin-Andersson 2000).

While scholars debate the importance of global diffusion for twenty-first-century regulation, even those who stress domestic or sector conditions note that EU nations drew heavily on Britain's pioneering efforts (Humphreys & Padgett 2006) and that Thatcherites and Japanese institutional reforms drew selectively on the American model (Moran 2003, pp. 105–7; Vogel 1996). Diffusion scholars have also used longitudinal, multivariate analyses to document the effects of horizontal diffusion on the spread of independent regulatory authorities. Studying multiple domains in 17 European countries, Gilardi (2005) finds that the likelihood of adopting a regulatory authority increases with the prevalence of those authorities among other nations. Jordana & Levi-Faur (2005) likewise find that horizontal dynamics fueled regulatory adoption among Latin American countries between 1979 and 2002, isolating both cross-sector diffusion within nations and within-sector diffusion across nations. These studies are noteworthy for documenting diffusion while controlling for sectoral, market, and domestic political factors (see also Busch et al. 2005, Way 2005). With new levels of empirical sophistication, these studies articulate one scaffold of the emerging

multilevel conception of twenty-first-century regulation.

Transnational Governance

The third challenge to RTB claims adds another scaffold to the analysis by considering the growth of transnational forms of regulation and standard setting: governance practices that occur across national borders but do not rely directly on formal agreements among states. At this level, too, the evidence confounds RTB-inspired images of a freewheeling, unruly globalization, revealing an explosion of rulemaking activity, a world of standards, and a hyperrationalization of technical and moral orders (Braithwaite & Drahos 2000, Brunsson & Jacobsson 2000, Djelic & Sahlin-Andersson 2006b; for an earlier treatment, see Keohane & Nye 1970). Transnational governance spans domains, from the quasi-financial regulation of the International Accounting Standards Board, bond rating agencies (e.g., Moody's), and private commercial arbitration (Botzem & Quack 2006, Dezalay & Garth 1996, Fligstein 2005) to technical and managerial standards issued by the International Organization for Standardization (ISO) (Loya & Boli 1999, Mattli & Büthe 2003, Prakash & Potoski 2006) and the environmental standards of the Forest Stewardship Council and similar associations (Bartley 2007b, Cashore et al. 2004, Guthman 2007). Even labor intensive industries with lean and mean supply chains are increasingly subject to transnational labor standards regimes, though questions remain about their robustness and effects (Arthurs 2001, Rodríguez-Garavito 2005, Trubek et al. 2000). European integration has also proven fertile ground for examining transnational governance (Mosher & Trubek 2003, Zeitlin 2005).

Research on transnational governance conceptualizes global interdependence not just as market integration or cross-national diffusion but as the embeddedness of state and nonstate actors alike in higher-order rulemaking projects. The rise of transnational governance demonstrates that states hold no monopoly on rulemaking, and the literature on transnationalism overlaps with literature on the rise of private authority (Cutler et al. 1999). But as Djelic & Sahlin-Andersson (2006a) point out, transnational governance "cannot be described as a simple move from state to nonstate regulation .... [I]t is a development where state regulators are increasingly embedded in and interplay with many other regulatory actors" (p. 377).

Although some view transnational governance as a fragmented, neomedieval patchwork of authority (Kobrin 1999), scholars increasingly think in terms of more coherent fields of governance and the patterns of discourse, organization, and networking on which they rest (Djelic & Sahlin-Andersson 2006b). Discursively, systems of transnational governance resonate strongly with world cultural principles of scientization and rationalized moral codes, as well as with neoliberal market logics (Djelic 2006, Djelic & Sahlin-Andersson 2006b). Yet, were it not for the existence of transnational organization and networks of experts and advocates, such principles would remain largely symbolic. The post–World War II explosion of international nongovernmental organizations (INGOs)—from business and trade groups to human rights and environmental organizations—not only linked nation-states to global scripts (Boli & Thomas 1999, Frank et al. 2000), but also generated an army of creators and carriers of new transnational regulatory models (Bartley 2007b, Djelic & Sahlin-Andersson 2006b). Activist-oriented transnational advocacy networks (Keck & Sikkink 1998) and expert epistemic communities (Haas 1992) also contribute regularly to the construction and operation of transnational regulatory orders, as do international business service firms (Strange 1996). Law firms, consultants, and accounting and auditing firms have become prominent verifiers of compliance with transnational standards, with lawyers and consultants figuring centrally in tailoring transnational governance to their locally situated clients' needs (McKenna et al. 2003). Indeed, some

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of these groups—such as the multinational auditor Société Générale de Surveillance—are key players in numerous regulatory domains (Bartley & Smith 2008, Braithwaite & Drahos 2000). Overall, the structuration of the transnational sphere serves as both a new platform for global regulation and a vehicle for fostering regulatory expansion within nation-states.

Beyond these characterizations lie several lines of research and debate on the specific relations between transnational arenas and nation-states. First, while some scholars consider transnational governance initiatives like the ISO to be pure forms of standardization whose rationality transcends the provincial interests of nations (Loya & Boli 1999), others have found that national institutions get reinscribed in arenas like the ISO (Mattli & Büthe 2003). Research on global legal orders similarly finds imprints of American law firms that remain rooted in national frameworks even as they become transnational players (Dezalay & Garth 1996, Morgan 2006). Second, scholars debate the primacy of the state in creating and endorsing transnational governance (Bartley 2007b, Sassen 2002). Some argue that the great powers can decisively shape what emerges in transnational fields, as was true for the Internet Corporation of Assigned Names and Numbers, which only gained authority once U.S. and EU concerns vetoed several alternatives (Drezner 2007). Alternatively, such developments may reflect what Jessop (1997) calls a "hollowing out" or "denationalization of the state," as nation-state functions are shifted to trans- and subnational levels. If hollowing out and transnational governance are zero-sum developments—an issue not resolved—the net increase of rulemaking may be small.

Finally, states are themselves dis- and rearticulated in transnational governance. According to Slaughter (2004), transnational networks now exist among parts of states, including regulators linked in the International Organization of Securities Commissioners or judges in the European Court of Human Rights. The EU itself is a case of transnational networked governance, with groups of linked regulators developing coherence, identities, and authority independent of their national moorings (Dehousse 1997). Regulatory networks and Commission-fostered expert communities have even exercised de facto powers over key sectors such as telecommunications by developing best practice solutions, standards, timetables, and roadmaps for national governments (Eberlein & Grande 2005). Here and elsewhere, scholars have documented the rise of transnational systems that support expanded rules and rulemaking in this era of globalization.

BEYOND BUREAUCRATIC ENFORCEMENT? NEW REGULATORY FORMS

Fueled by crises of command and an explosion of rulemaking experiments, scholars are also rethinking the form of regulation itself. This work is partly a response to challenges of globalization, but it is also rooted in the perceived failures of domestic, state-based regulation. Indeed, descriptions of new forms often counterpose them to a prototypical image of command-and-control regulation, where states define detailed, prescriptive, and binding standards of behavior, monitor compliance, and enforce standards via courts or administrative sanctions. Although it glosses over undercurrents in prior work on nonstate regulation, this imagery is a useful point of departure for understanding how new forms revise twentieth-century logics and reconfigure relations between regulator and regulated. We use this image to suggest dimensions along which new regulatory projects challenge the assumptions of state-based models. Existing studies provide a rich but disjointed view of new forms, describing four key categories: regulation-for-competition, cap and trade, regulation by information, and soft law or experimental governance. We layer our dimensions onto these forms to integrate multiple literatures and clarify analytically important commonalities and distinctions between and within new schemes.

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New forms challenge the logic of traditional state regulation in one or more of five increasingly fundamental ways.

- Competition: Traditionally, regulation has been assumed to suppress competition—for better or worse. But new forms typically embrace markets in one way or another, redeploying regulation to foster competition (markets as the ends of regulation) or using competitive markets to achieve regulatory goals (markets as a means of regulation).
- Levels: Where regulation was delegated to singular, often national nodes of authority, new forms are often multilevel schemes, in practice or by design, nesting regulatory agencies and the regulated in broader systems of translocal or transnational rulemaking.
- Actors/domains: Where traditional schemes vested authority in state agencies—either ministries or independent regulatory bodies—new forms increasingly rely on actors outside the state, blurring lines between public and private ordering.
- Standards/standard setting: While command-and-control schemes relied on detailed and universal prescriptions to specify in advance the behavior desired from firms, some new forms alter the shape, level, and/or ex ante character of standardization, assigning the tasks of defining standards to regulated organizations themselves. One move in this direction is to organize the regulated into standard-setting processes, having them develop and revise standards through collective dialogue and deliberation. Another is to avoid standardization of how regulated organizations should address a problem and instead set standards only for the aggregate outcome, allowing firms the discretion to define individually their own courses of action.
- Sanctioning/behavioral change: Where traditional schemes relied on formal sanctions imposed by a bureaucratic authority, new forms often seek to foster behavioral change via other mechanisms and agents. These include informal social pressure (e.g., naming and shaming), learning through peer-review comparison, price-driven processes based on dispersed decisions by consumers or producers, and providing consumers or advocacy groups with tools to impose sanctions via political or legal means.

We suggest no one-to-one correspondence between these dimensions and the forms as currently described. Forms depart from traditional schemes in multiple ways. In fact, our aim is to capture nuances about forms that would be overlooked through simple classifications of state versus nonstate, market-based versus standards-based, or even markets versus states versus self-regulation. Of course, our dimensions and discussion of prominent forms may not capture the entire range of regulatory experiments. We expect future work to revise our scheme as new experiments come to light.

Regulation for Competition

Images of regulation in privatized industries entail relatively straightforward revisions of classical views. Regulation remains largely state-based, but it alters the relation between state and market. First, it redivides labor between public and private, shifting from a postwar state that combined steering (direction, guidance) and rowing (enterprise, provision) to a regulatory state that retains a steering role but delegates provision to private business or nonprofits (Osborne & Gaebler 1992). Second, it eschews regulation-against-competition, criticized by economic theorists, for regimes that combine regulation-of-competition (oversight of mergers, cross-ownership, concentration) with regulation-for-competition, where states intervene in sectors to create conditions for competitive markets (Jordana & Levi-Faur 2004, Majone 1997, Henisz et al. 2005).

This revised image of the relation between regulation and competition flows partly from

the insight that markets, in general, must be actively constructed by states. It also flows from the pragmatic demands of privatization and liberalization. States have had to reorganize themselves and intervene actively to promote entry (licensing), define boundaries for providers (unbundling services, disintegration, single capacity), and ensure access to interconnection or intermediate services at nondiscriminatory rates. They have also had to create trading and pricing rules, protect investors or consumers from fraudulent practices or services failures (prudential, disclosure rules, universal service rules), and check the ability of incumbents to fight off new rivals (Vogel 1996, Majone 1997, Moran 2003, Humphreys & Padgett 2006).

Analysts of regulation for competition emphasize its varieties across nations and sectors, drawing on comparative political economy and highlighting continuities or discontinuities with the past. Some states embrace a sector-specific, independent regulatory agency approach, looking to the American model but adapting it to local conditions (Moran 2003). Others are averse to delegating authority to extragovernment agencies and utilize reformed or new units within existing ministries. States likewise vary in the types of market orders they pursue, with Britain standing as an axial case (Vogel 1996, Moran 2003, Jordana et al. 2006). Concerns with political capture, meddling, and judicialization led British officials to adopt fixed procedures and strategies that minimized regulators' discretion and that constructed for firms an impersonal and ruthlessly competitive international market presided over, at arm's length, by a neutral referee. At the other pole are states such as Germany, France, Spain, and Japan, where officials sought new bases for discretionary authority and adopted more engaged, coordinated, or statist strategies, intervening selectively and in detail both to create markets incrementally and to help domestic producers adjust to competitive environments.

Finally, imageries of regulation-for-competition emphasize its multilevel character, reflecting how states and market making are increasingly embedded in transnational systems (Humphreys & Padgett 2006, Jordana et al. 2006, Majone 2000). This embeddedness can be seen in the rise of the International Competition Network, a meta-organization in which regulators, firms, and experts circulate ideas, models, and lessons (Djelic & Kleiner 2006). It can also be seen in the European context, where national regulators upload problems, models, or solutions into EU fora (e.g., working groups, the Commission and its Directorates, the Court of Justice); interact with each other and EU officials to develop rules, guidelines, and timetables for particular industries; and then download rules, principles, and templates to member states for implementation, subject to their discretion in adapting rules to local contexts. Here, research on regulation-for-competition intersects with work on soft law, reflecting the EU's limited sanctioning capacity in many arenas (Jacobsson & Sahlin-Andersson 2006). Yet under the Rome Treaty, the Commission has unique powers to regulate firms directly in the area of competition policy, which it has used to approve mergers, set conditions for joint ventures, force governments to open access to airports and telecom systems, and fine anticompetitive behavior (McGowan & Wallace 1996, Wilks & Bartle 2002).

Regulation by Information

Regulation by information refers to an array of experiments with disclosure, rating/ranking systems, and certification or labeling initiatives. Such schemes rely on the release and dissemination of information to discipline firms and stimulate enforcement by consumers, investors, or advocacy organizations (Fung et al. 2007, Majone 1997, Slaughter 2004). Although economists have endorsed regulation by information as a way to "perfect" the market (Breyer 1982, p. 161), this form mainly emerged piecemeal from community right-to-know laws and pragmatic responses to policy crises (Fung et al. 2007). Several variants exist, but a defining feature of this form is that it makes securing behavioral change exogenous to the regulation

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itself—ceding sanctioning to other actors. By forcing or facilitating disclosure, regulation by information seeks to create the conditions for consumers, investors, or advocacy groups to apply rewards and penalties without prescribing what those sanctions should be. Such sanctions might operate via price mechanisms—if consumers change their purchasing habits—or via citizens contesting firm practices through political or legal channels. While some equate regulation by information with the market, its enforcement often rests instead on states (lawsuits, new command-and-control statutes) or associations (community pressure, public protest).

Fung et al.'s (2007) research on "targeted transparency policies" identifies one key variant of the form, rooted in public authority, in which states mandate public disclosure of structured, factual information but prescribe no particular course of action beyond accurate disclosure itself. Such policies can be effective. Securities and Exchange Commission (SEC)-mandated financial disclosure is, despite recent scandals, firmly embedded in the decisions of both users (investors) and disclosers (managers) and imposes discipline on corporate behavior. A California law requiring restaurants to post health inspection letter grades in their windows spurred improvements (especially for those graded C or below) by providing unambiguous information for consumers, as has the U.S. five-star system for rating automobile safety. In contrast, the Toxics Release Inventory for pollution emissions has been only moderately effective, as it is minimally embedded in the decisions of home buyers and community groups and is dogged by questions about which pollutants to report. Other efforts—reporting tap water quality, healthcare patient safety, and advance notice of mass layoffs—have foundered owing to overly complex forms of disclosure, minimal connection to consumer or citizen choices, or disagreement on reporting metrics.

Disclosure also takes the form of voluntary programs or systems created by private organizations (Sabel et al. 2000, Slaughter 2004). One such voluntary disclosure project extends the model of financial reporting and calls for firms to report publicly their social and environmental performance. After early failures, advocates turned sustainability reporting and triple-bottom-line reporting (financial, environmental, and social) into common practices for a growing number of corporations (Zadek et al. 1997). The UN Global Compact promotes corporate reporting on labor, human rights, and environmental management, although many participants have not kept their promise to report (Deva 2006). The Global Reporting Initiative promotes best practices for social and environmental reporting but steers clear of setting standards for acceptable performance levels or outcomes. These systems represent relatively pure disclosure variants that both cede sanctioning to external actors and limit prescriptive, ex ante standardization simply to the reporting process itself or to types of behaviors to be metered. As such, they take Brandeis's famous aphorism that "sunlight is the best disinfectant" to mean that simple disclosure can expose best and worst practices, structure attention, and facilitate learning.

In rating/ranking systems and certification/labeling initiatives, the information provided indexes firms' conformity with some pregiven set of standards and performance metrics. Rating has a long, if checkered, history in financial markets, dating back to Moody's, Best's, and Standard and Poor's systems for evaluating investments and insurance companies. More recently, ranking systems have become powerful regulators of quality in university programs. Among American law schools, where a single rater (*U.S. News & World Report*) holds a de facto monopoly, ranking drives administrators to reorganize their internal operations, prioritize test scores, and inflate selectivity and employment metrics. Even small changes in rank affect the number of applications (Sauder & Lancaster 2006). Although this is a voluntary, privately operated system, the high costs of opting out make it a powerful regulatory force, much like bond rating (see Sinclair 2005).

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Rankings of MBA programs hold similar sway over the international field of management education, although the presence of multiple ranking systems (*Business Week*, *Financial Times*, *The Economist*, and others) means a weaker hold on schools (Hedmo et al. 2006, Sauder & Espeland 2006).

Certification and labeling systems similarly disclose codified information about compliance with pregiven standards and date back at least to the Underwriters' Label (UL) symbol developed in the early twentieth century (Cheit 1990). But it is in the past two decades, after experiments with organic certification in the 1970s (Guthman 2007), that certification has become a prominent mode of social and environmental regulation. Groups like the Forest Stewardship Council, Marine Stewardship Council, Social Accountability International, and Fairtrade Labelling Organizations International emerged in the 1990s to certify sustainable forestry and fisheries, nonsweatshop and child labor–free factories, and equitable agricultural operations. The rise of this model in part reflects firms' interests in protecting their reputation in the face of activist scrutiny (Haufler 2001, Spar & Yoffie 2000) and the existence of some (though not always substantial) demand from ethical consumers (Elliott & Freeman 2003, Sabel et al. 2000; but see Vogel 2005, Linton et al. 2004). But as Bartley (2007a,b) has shown, these market dynamics must be combined with an account of the institution-building projects of NGOs, governments, and foundations to explain the rise of this form (see also Cashore et al. 2004).

Although states operate their own voluntary certification or rating systems—as in European governments' eco-labels and the Energy Star program in the United States—private sector initiatives more extensively alter traditional regulation. State-based programs typically feature a single authoritative standard. In contrast, private certification opens up a more complex politics of information, with several important implications. First, where insufficient market or institutional pressure exists to force organizations to participate, only those firms that are reasonably sure of receiving positive evaluations will participate. This may undermine the potential for transparency initiatives to spur improvements among actors exposed as subpar (e.g., restaurants graded C or lower in health inspections). Relying on the regulated industry to fund rating systems can likewise subvert their efficacy, as recent developments in financial market regulation suggest. Second, when certification and rating are left to the private sector, multiple competing initiatives often arise (see Bartley 2007b, Cashore et al. 2004, Kolk 2005). On the one hand, competition among credibility-seeking certifiers might generate a race to the top (Sabel et al. 2000) and upward harmonization of competing standards, which appears to have occurred in the forestry sector (Overdevest 2005). On the other hand, adding this new information to the marketplace may generate confusion rather than informed choice, with competing certifiers undermining the objectivity of ratings and fueling a "spiral of distrust" (Djelic & Sahlin-Andersson 2006b, p. 13; see also Shapiro 1987).

Finally, the proliferation of private certifiers and raters raises questions about how information is generated—that is, how the world is made auditable (Power 1997; see also Espeland & Vannebo 2007). Moving auditing away from centralized bureaucratic control broadens the array of actors claiming competency in auditing and verification. Research on labor standards also shows that differences in the technologies, skills, and worldviews of auditors can shape the accuracy of information about a factory (O'Rourke 2002), particularly given power differentials between auditors and workers, coaching by management, and auditors' tendency to identify culturally with managers (Sum & Pun 2005). The politics of information and expert judgment is hardly new. But the prominence of regulation by information has reinvigorated debates about competing forms of expertise vis-à-vis the value of local knowledge. Ultimately, the content, accuracy, and style of information produced will affect the viability of ceding

enforcement to informed consumers, investors, and citizens.

Tradable Permits and Cap and Trade Regulation

Cap and trade systems use market processes to stimulate improvements in a different fashion, transforming the activity to be regulated into a set of permits that can be bought and sold by firms in a market. Here, it is the price mechanism operating within an industry, through market pressures from producers, rather than consumers, that is invoked to improve performance. Advocated by economists, proposals to reduce pollution through tradable credits appeared in the 1960s. They were occasionally implemented in the late 1970s and 1980s and have since become prominent tools for addressing air pollutants and, to a lesser extent, water pollution, fishery management, and other common-pool resource problems (Breyer 1982, Tietenberg 2001).

Tradable permit systems revise both the standard-setting process and the mechanisms for securing behavioral change associated with traditional environmental regulation. First, whereas traditional regulation often prescribed particular technologies and practices to be adopted by firms, tradable permit systems set standards only for the level of allowable pollution (or other item), issue permits equal to that amount, and leave firms to choose their own courses of action. Second, instead of having a bureaucratic agency that sets fines for noncompliance, cap and trade systems allow the market prices of permits to determine incentives for behavioral change. Firms that can adopt cleaner technologies at a lower cost than the going rate of permits are expected to do so and will sell their permits, whereas those firms for which the costs of scrubbers, alternative fuels, or other improvements are high will have to purchase the permits. Not all firms or even all regions will reduce their emissions. But aggregate levels of pollution can be lowered efficiently, proponents argue, without an omniscient regulator who knows the right technologies and costs of noncompliance, and without the transaction costs of managing recalcitrant actors. Going beyond even tax-based regulation (green taxes), which require government to fix the price of pollution, tradable credits systems dispense with this administrative task, letting the cost of compliance be set by market dynamics (Tietenberg 2001).

One of the most studied examples of this form is the U.S. program for sulfur dioxide (SO_2) emissions, created in 1990 to minimize acid rain caused by the burning of sulfur-heavy coal. Although credits in the SO_2 market sold at a lower price than predicted—raising concerns that actors were gaming the system and avoiding investments in cleaner technology (Tokar 1997)—this program is typically judged a success (Levin & Espeland 2002, Tietenberg 2001). SO_2 emissions fell, the total costs were lower than would have been likely absent the credit trading system, and the system was able to adapt to unexpected changes in the costs of cleaner fuels (specifically, an important drop in the cost of low-sulfur coal) (Schmalensee et al. 1998).

Although tradable permit systems are touted as an alternative to state intervention, states must still set the initial allowance, monitor compliance with credit requirements, and adjust the allowance over time. Levin & Espeland (2002) suggest that the state's role may go beyond that, given the technical, organizational, and cultural work required to turn pollution into a commensurable good that can be measured, monitored, and commoditized. Similarly, Engels (2006) shows how states and transnational dynamics were implicated in making the European carbon market and how market creation was a particular form of rulemaking. The seeds of this market lie, ironically, in U.S. demands for emissions trading as an alternative to mandated reductions in the Kyoto Protocol. Although the EU resisted U.S. demands at the time, EU officials and several European state agencies latter pressed for tradable pollution credits at the EU level (Engels 2006). Resonating with arguments about regulation for competition, these observations suggest further how new forms like cap and

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trade are more about revising relations between states, rulemaking, and markets than about simply replacing one form with another.

Soft Law and Experimentalist Governance

Soft law and experimentalist governance represent a fourth form discussed by analysts of the new century. Broadly speaking, this form departs from hard law by reducing the degree to which rules are legally binding, replacing detailed rules with broad guidelines, and/or doing without legal adjudicative mechanisms (Abbott & Snidal 2000). It thus includes many private sector rulemaking projects (Kirton & Trebilcock 2004) as well as many norm setting and harmonization projects in governmental, intergovernmental, or transnational arenas.

These systems revise traditional models in two crucial ways. First, although they rely on rulemaking and standard setting, they replace rigid standards imposed from above with processes in which the regulated organizations play a central role in developing or revising standards. In this way, soft law reorganizes traditional relationships between the regulator and the regulated. It mobilizes firms to write their own rules—and even make them legally binding (Ayres & Braithwaite 1992)—and/or encourages the regulated to edit and translate rules according to local circumstances (Jacobsson & Sahlin-Andersson 2006). Moreover, in transnational contexts, states are themselves both the source and subject of soft law, partially inverting traditional regulatory relations.

Second, instead of relying on formal sanctions and state coercion, soft law proceeds by mobilizing social dynamics among the community of the regulated. This can take many forms, from peer pressure and shaming that spawn an "industrial morality" (Rees 1994) or "set of norms which generate a sense of obligation" (Gunningham & Grabosky 1998), to more nuanced mechanisms involving agenda setting, creating new concepts and language for thinking about problems and solutions, binding firms to rules through membership, asking participants to give reasons for rules/compliance/noncompliance, mutual monitoring, and peer review (Djelic & Kleiner 2006, Jacobsson & Sahlin-Andersson 2006, Jacobsson 2004, Mosher & Trubek 2003, Sabel & Zeitlin 2008). Soft law may be consistent with a strong state, as the threat of punitive measures can help forge communities of interest. But state intervention is at most an exception rather than the rule, serving as a "benign big gun" at the top of a pyramid of graduated sanctions (Ayres & Braithwaite 1992, p. 19).

The theorists of soft law include critics of states and markets, legal and political theorists of democratic legitimacy (e.g., Cohen & Sabel 1997), symbolic interactionists (e.g., Hawkins 1984), and rationalist international relations scholars seeking efficient international agreements in the face of high contracting costs and political roadblocks (e.g., Abbott & Snidal 2000). Many imageries of soft law are inspired by Braithwaite and colleagues' arguments from criminology that social control devices based on shaming, exclusion, and reintegration into the community could be applied to corporate crime (Braithwaite 1989, Fisse & Braithwaite 1983). For these scholars, "dialogic webs" that facilitate shaming and approbation, habituation of compliance, and normative convergence have played a more important role in upgrading global regulation than have "webs of reward and coercion" and state action (Braithwaite & Drahos 2000, p. 252). But the interest in soft law also derives from concerns about rigidity and legalism in American regulation. Going by the book and applying fixed and universal environmental standards to industries of heterogeneous firms was, by this account, an exercise doomed to inefficiency, endless legal challenges, and few performance enhancements (Bardach & Kagan 1982). Significantly, OSHA's legal sanctioning did reduce accident levels, but cooperative styles of enforcement generated similar improvements with few sanctions (Scholz & Gray 1997).

Two American environmental programs have become touchstones for debates about

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soft regulation. According to Rees (1994), the Institute of Nuclear Power Operations (INPO) represents a successful case of soft law. Founded after the Three Mile Island accident in 1979, INPO worked in part because one more accident might threaten the industry's very existence and because participants perceived that intervention by the Nuclear Regulatory Commission would be not only disruptive but insufficient to repair the industry's legitimacy (see Campbell 1989). INPO set performance objectives (but not the precise methods to reach them), conducted facility inspections, and reported the results to the rest of the industry. Initially, INPO struggled to stimulate peer pressure and faced resistance from poor performers. But under pressure from insurance companies, it managed to add more teeth to the program and increase its capacity through a system of comparative performance benchmarks.

Some scholars also see potential in Responsible Care, a self-regulatory soft law program created by the chemical industry after the 1984 Bhopal disaster. For Gunningham & Grabosky (1998), the code of practice adopted by companies, the formation of leadership groups, and the potential for naming and shaming made this initiative "one of the most sophisticated and advanced self-regulatory schemes yet developed" (p. 171). Yet, opportunism and free riding have often outweighed industrial morality in this case, and evidence that participants went no further than nonparticipants in reducing toxins suggests that declines in emissions are not attributable to the program (King & Lenox 2000).

Also interested in environmental regulation, Sabel and colleagues identify the rise of experimentalist governance schemes that combine local experimentation with central pooling of results, systematic comparison, and the ongoing revision of rules and targets in light of new discoveries (Cohen & Sabel 1997, Sabel & Dorf 1998, Sabel et al. 2000). In this variant, firms and local communities are granted responsibility and discretion, within broad guidelines, to set their own targets for environmental improvement, develop and experiment with solutions, and establish systems to assess how well they achieve targets. In exchange, local units agree to provide detailed reports on their methods, metrics, discoveries, and performance to the regulator (or peer inspectorate), who then pools the data and collaborates with local units to compare solutions and set new benchmarks, metrics, and methods for subsequent efforts. In these ways, local units are scrutinized, are given the means to assess and improve their own performance, and can incrementally revise rules and targets as their capacities improve (Sabel et al. 1999). This rolling rule system, the authors contend, characterizes the Massachusetts Toxics Use Reduction Act (TURA), the Chesapeake Bay Program, and the Habitat Conservation Plan processes in California. Massachusetts's TURA extends the Toxic Release Inventory by requiring firms to accompany release reports with toxics use reduction plans that specify measures to be adopted, schedules for their implementation, and two- and five-year targets. TURA also established a peer inspectorate of certified planners to review usage reduction plans and a system to pool experience, compare performance, and help firms meet their targets. The Chesapeake Bay Program combines a multistate, interagency Executive Council with the organization of citizens' groups to implement and revise runoff reduction targets and implementation tools.

Not surprisingly, some of the richest accounts of experimentalist governance emerge from research on the EU and its Open Method of Coordination (Jacobsson 2004, Mosher & Trubek 2003). Facing high unemployment in the 1990s, the EU lacked the capacity to manage employment and social provision. Many governments were reluctant to abandon their welfare state traditions, and the Union itself was facing a localizing backlash. The result was a European Employment Strategy (EES) that put reporting and peer review at the center of an iterative process to coordinate employment policies (Mosher & Trubek 2003).

For Sabel & Zeitlin (2008), EES is part of a larger architecture of EU experimentalist governance, which also arose from the reregulation of privatized industries and networked

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administrative agencies in health and safety. Regulation in this model begins with councils or networks of EU officials and member states that set framework goals, timetables, and metrics for gauging and comparing performance. National ministries and regulators then have the discretion to advance these goals and translate guidelines into local practice as they see fit. But they are obliged to report their performance on those metrics, to participate in peer reviews that compare how member state methods perform, and to periodically revise goals, metrics, and procedures in light of those comparisons. Again, the emphasis is to abandon fixed rules and bureaucratic enforcement in favor of local experimentation and deliberative processes that expose new possibilities and foster interactions in which states learn from, discipline, and set a continually corrected baseline for one another. Such arrangements, theorists emphasize, differ qualitatively from soft law/naming and shaming systems that use informal social pressure to enforce conformity to prior standards. Experimentalist regimes are systems of discovery and learning. They organize participants to develop and revise sometimes detailed standards and targets collectively through deliberation and systematic comparison. They take diversity as a resource to be fostered rather than reduced via enforcement. They rely on an array of mechanisms to promote behavioral change, including the use of comparison and penalty defaults to destabilize established understandings, the fostering of common cognitive frameworks to discipline interest-based bargaining, and the leveraging of higher-order processes by specific (usually domestically based) actors. Furthermore, they feed into (and reflexively evaluate) conventional legislation by nation-states, further blurring lines between soft and hard law processes.

NEW DIRECTIONS FOR THE NEW CENTURY? AGENDAS FOR FUTURE RESEARCH

Rethinking interdependence and theorizing new forms have helped solve the puzzle of regulatory expansion in the era of globalization, while broadening the repertoire of concepts available for analyzing regulation in the new century. Yet the enthusiasm to understand the new era has left two key tasks largely undone.

From Form to Practice

Just as law and society research critiqued legal scholarship for focusing on law on the books more than law in action, scholarship on new regulatory forms has produced far more empirical research on their rise and character than on their translation into practice. This tendency flows partly from methodological challenges in studying how forms shape behavior on the ground. It also likely flows from theoretical preoccupations in some quarters with adoption, diffusion, and legitimacy, which can sideline issues of implementation, effectiveness, and local impact. Yet in the face of financial scandals, global warming, and massive inequalities across nation-states, questions about the impacts and effectiveness of these forms are crucial. Fortunately, some research has begun to assess impacts on organizational practice, whether rooted in large-*N* analyses (e.g., Schofer & Hironaka 2005) or case-based fieldwork (e.g., O'Rourke 2004). Moreover, recent work by institutionalists, law and society scholars, and others contains middle-range concepts and methodological guidance for analyzing the effects of twenty-first-century regulation on practice.

One direction for future work is to address how rules and models are reshaped during their implementation. Research on the translation of global models into local settings has shown that legal and organizational blueprints rarely emerge unscathed from a trip from one setting to another, instead getting altered via editing, retheorization, and creolization (Campbell 2004, Czarniawska-Joerges & Sevon 1996, Djelic 1998, Merry 2006). Carruthers & Halliday (2006) present one framework for this phenomenon, analyzing how a model of corporate insolvency law advocated by international organizations was partly resisted, partly

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incorporated, hybridized, and indigenized as it was exported to China, Indonesia, and South Korea. This framework recognizes the multilevel and iterative character of implementation, highlighting recursive cycles of translation and back-translation between the global and the local, in which the loose ends and contradictions of prior efforts within nations fuel struggle and elaboration at the national and transnational levels, feeding forward into new rounds of translation (Halliday & Carruthers 2007). Edelman and colleagues' (1999) "endogeneity of law" framework also addresses the translation of form into practice. Here, ambiguity in legal mandates spurs contestation over the meaning of the law and efforts by regulated organizations and professional advisors to construct their own understandings of compliance. These constructions often blend in logics unrelated to the purpose of initial legislation—including managerial logics of efficiency and profit and professional claims for jurisdiction. As organizations adopt new structures as symbols of compliance, these may both support mobilization within organizations and become authoritative aspects of the law as they get endorsed by courts.

The methodological challenges involved in documenting translation and the local effects of translocal governance are formidable, but key contours for this research are already clear (Zeitlin 2005; see also Schneiberg & Clemens 2006, Schofer & McEneaney 2003). At a minimum, such research demands clear specification of mechanisms and channels through which global/translocal rulemaking shapes local policy and policy shapes local practice. It also rests on careful measurement over time of policy, discourse, and practice at multiple levels. Quantitative technologies exist for documenting some of these cross-level effects, notably the impact of transnational fields and diffusion on state policy and structure. But strategies for studying yes-no outcomes like adoption need to be modified to consider how the content or framing of a model changes as it is translated across levels. Such cross-level effects could also be documented by tracing how the language of transnational settings infuses or reframes domestic policy debates or by examining how actors seeking to change practices on the ground strategically leverage global models or norms to that end. Both cognitive and coercive mechanisms may shape translation. Furthermore, as Zeitlin (2005) points out, future scholarship on translation can strengthen inferences about global effects on local policy and practices to the extent that its research designs take into account domestic trajectories prior to transnational activity, upward effects in which nations shape transnational rulemaking (endogeneity), the selective downloading of translocal models, and strategic representations of compliance by regulated organizations.

A second direction for future research is to recognize that the contexts of regulation are diverse and study the conditions under which particular regulatory forms and enforcement mechanisms are most likely to take hold. Soft law and regulation by information do in some contexts powerfully reshape organizational practice in the absence of hard capacity for coercion. Law school rankings, for instance, impose significant constraints on the admissions and placement process. Through a dynamic that Espeland & Sauder (2006) call "reactivity," rankings profoundly transform the world they purport to measure, as administrators direct resources to raise average LSAT scores and reorganize career services offices.

In other contexts, formally similar systems fail to produce self-enforcing dynamics, whether because of a lack of communal pressure among the regulated or an underdeveloped audience for regulation by information. Yet this does not necessarily mean that these systems are meaningless because other enforcement mechanisms may arise as social movements, states, or other organizations leverage soft law and disclosure into different forms of intervention. This might lead to layering hard law and coercion over softer forms of regulation. In the case of labor standards in global supply chains, variants of soft law and regulation by information have clearly emerged, with many large apparel, footwear, and toy companies participating in standard-setting projects and

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certification initiatives. Yet the rolling rule regimes theorized by Sabel et al. (2000) have largely failed to develop: Consumer demand for fair labor has been less than expected, certification has not led to unambiguous "no sweat" labels, and verification is plagued by falsified record keeping and commoditized monitoring services (Sum & Pun 2005). Here, reactivity has meant symbolic change, decoupling, and evasion—as seems also to be true in current financial market regulation. Nevertheless, coalitions of transnational and local activists have sometimes been able to turn firms' symbolic commitments into real gains (e.g., unionization of factories), although doing so has required substantial social movement activity, facilitative trade pressures on national governments, and some degree of domestic state capacity (Rodríguez-Garavito 2005, Seidman 2007). While failing on their own terms, soft law and information disclosure might create platforms for more effective hard enforcement.

At a minimum, we suspect that soft law, rating, and certification systems will most likely reshape organizational practice in a deep way where they are independently funded and credibly free from capture, where regulated organizations constitute a relatively homogeneous and well-known group, and where regulatory goals can be aligned with the interests of a critical mass of organizations. Nonbureaucratic forms of regulation should also be more effective when targeted actors constitute a dense organizational field of frequently interacting, mutually attentive organizations or when critic communities are well developed (Scott 1994). Absent these conditions, hard enforcement of soft regulation might be the only option. Here, too, the accuracy and independence of information will be critical, a lesson brought home by investment bank funding of securities rating. But making these systems work in a transnational context will almost certainly also require more traditional power resources, including (*a*) social movements or civil society groups capable of monitoring, pressuring and demanding accountability from firms and public officials in a sustained fashion, and (*b*) states with the independence and administrative capacity to bargain with and impose rules on firms (see Seidman 2007).

How these twenty-first-century systems of regulation work in practice may also depend on how they overlap with one another and with older forms of regulation. Indeed, a third direction for future work considers the interplay of multiple regulatory dynamics and forms, including the possibility that there are mixed and contradictory dynamics in play. Researchers often focus on the aggregate effect of globalization on regulation, but there is little reason to expect trade pressure, diffusion, and transnationalism or the experiments with different forms always to move in tandem. For example, although transnational structures have fostered the global diffusion of environmental ministries (Frank et al. 2000), this diffusion occurred alongside trade pressures that limit enforcement capacities in developing countries (Porter 1999) and the rise of decontextualized, neoliberal theorizations of environmentalism that provide little leverage for changing concrete practices (Goldman 2005). What first looks like ratcheting up may actually involve several countervailing processes.

Furthermore, multiple forms of regulation often intersect, raising questions about the extent to which they undermine or reinforce one another. Here, researchers can draw on recent work that theorizes combinations of soft and hard governance forms (Sabel & Simon 2006, Trubek & Trubek 2007). In some situations, multiple forms coexist in tension or rivalry, whether because one is a drag on the other's development, because they emphasize competing routes to upgrading, or because their goals are directly contradictory. It is also possible for two forms to be complementary but inert, meaning that the forms remain unaltered as they are hybridized. Finally, a more radical, transformative hybridity is possible, in which regulatory forms are reciprocally reshaped as they intersect, "creating institutions with no close analogue in either of the original classes" (Sabel & Simon 2006, p. 404).

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At present, we know too little about these interplays to know what configurations are stable or potent. Generating this knowledge first requires moving beyond the common practice of examining a single regulatory form in isolation. Then scholars can proceed to compare multiple forms in the same domain—for instance regulation by information and state-based bureaucratic enforcement—and, going further, to examine their interplay and coevolution. Literatures on legal pluralism (Berman 2007, Merry 1988), among others, may prove useful in conceptualizing a world of overlapping legal and quasi-legal orders, ambiguous patterns of nesting, and contradictory normative rationales. In any case, by engaging with questions about rivalry, hybridity, and plurality, future research can more clearly specify how new configurations of forms might reshape organizational behavior.

Old in the New, New in the Old?

Recent work on regulation presents the powerful conviction that an era has passed and that globalization and neoliberalism have punctuated all previous equilibria, yielding a "Cambrian explosion" of new forms (Sabel & Zeitlin 2008, p. 11) that calls for new tools and concepts. Discontinuity has been a productive working hypothesis. Yet this new antinomy marks too sharp a divide with the past, leaving the analytical potential of recent work untapped. Indeed, we suspect that using tools crafted for the twenty-first century to reconsider pre-Cambrian forms and dynamics in the American wellspring could bring new facts to light and revise received views of its core features.

First, although accounts of the twenty-first century routinely cast nineteenth- and twentieth-century regulation by independent commission as a distinctively American outgrowth of its privatized form of corporate capitalism, the American regulatory state developed in the profoundly transnational context of the 1870 to 1914 period. This other globalization involved not just unprecedented levels of international trade, but also "Atlantic crossings" (Rodgers 1998) of organizing templates, theories, and personnel, including German-trained economists John Commons and Richard Ely, who became leaders in their profession and architects of American regulation. These crossings figured centrally in the rise of regulation in the United States. For example, the public utility commission model for the electrical utility industry was directly influenced by Commons and his colleagues, German social economy, municipal socialism in European cities, and the spread of publicly owned utilities in the United States (Brigham 1998, McGuire 1989, Nord 1975, Rodgers 1998). In fact, architects and activists alike defined and defended the independent commission model relative to public ownership, sparking a century of evolution that combined and recombined those two models. Similarly, public officials in American property insurance forged a regulatory package that combined public oversight by expert commission with both (*a*) a model of self-regulation by association likely imported into the industry by British insurers, and (*b*) mutual forms of organization brought to the United States by German, Scandinavian, and British immigrants (Schneiberg 1999, Schneiberg & Soule 2005). Neither of these cases indicates that the American regulatory state emerged from simple diffusion. But both suggest that it was assembled from building blocks translated into the U.S. economy from abroad.

Second, the American regulatory state also emerged within a federated system of interacting but distinct political authorities, raising the possibility that its construction rested on the types of global dynamics highlighted by multilevel models of twenty-first-century regulation. Dunlavy's (1994) research on charter logrolling, regulatory expansion, and regulatory contraction in the railroad industry indicates that trading up and races to the bottom left their mark in key sectors during the nineteenth and twentieth centuries. There is also evidence that American regulation was produced by sociocultural dynamics of horizontal diffusion and global structuration emphasized in recent

research. As in the current period, building a regulatory state in American property insurance rested on a multilevel scaffold (Schneiberg & Soule 2005). States engaged in comparison and debate over regulatory models, providing one another with key principles for forging and legitimating local settlements. In addition, these settlements rested critically on trans-state developments: the U.S. Supreme Court's endorsement of regulation as "in the public interest," the promulgation of a model law by a national association of regulators, and the formation of a private actuarial bureau to enhance states' administrative capacities (Bartley & Schneiberg 2002).

Finally, new sensibilities about forms can be fruitfully turned to nineteenth- and twentieth-century settings. At a minimum, this approach would foreground an American landscape populated by a more diverse array of regulatory projects than is commonly perceived, confounding any simple identification of the U.S. regulatory state with an adversarial and formalized system of control. Disclosure systems, both private and public, have a history in the United States, including the Massachusetts sunshine commissions, the SEC, and consumer rating agencies like Consumers Union. The Federal Trade Commission sometimes operated as an advisory body, consultant, or clearinghouse, fostering relationships between regulator and regulated that resembled informal British self-regulatory schemes (McCraw 1984). The early American twentieth century was even a site of sustained experimentation with experimentalist governance. Between 1900 and 1930, cost accountants, associationalists, the Chamber of Commerce, and the Federal Trade Commission assembled an alternative to mergers, cartels, and mass production in which producers (*a*) collaborated to develop classification schemes for product and process costs, (*b*) supplied their associations with cost and product data according to those schemes, and (*c*) then used the industry averages compiled by associations to benchmark their own costs and improve their products and process, revising classifications as conditions evolved (Berk & Schneiberg 2005).

We neither deny the centrality of certain forms in the American case, nor assert continuity over discontinuity for the current period. As our review suggests, the twenty-first century involves innovation, a dramatic inflection in the proliferation of certain forms, and their redeployment at new (transnational) levels. Instead, we seek simply to highlight analytical payoffs to looking at the old through the lenses of the new. Doing so will reveal a far richer archeology of forms than is generally appreciated. It will also reveal an American regulatory state that was itself a product of multiple and competing projects, operating within and across communities, sectors, and states, and resting heavily on recombination and translation across levels. As with the unpacking of contemporary global regulation, this should be a fruitful direction for future research.

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DISCLOSURE STATEMENT

The authors are not aware of any biases that might be perceived as affecting the objectivity of this review.

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