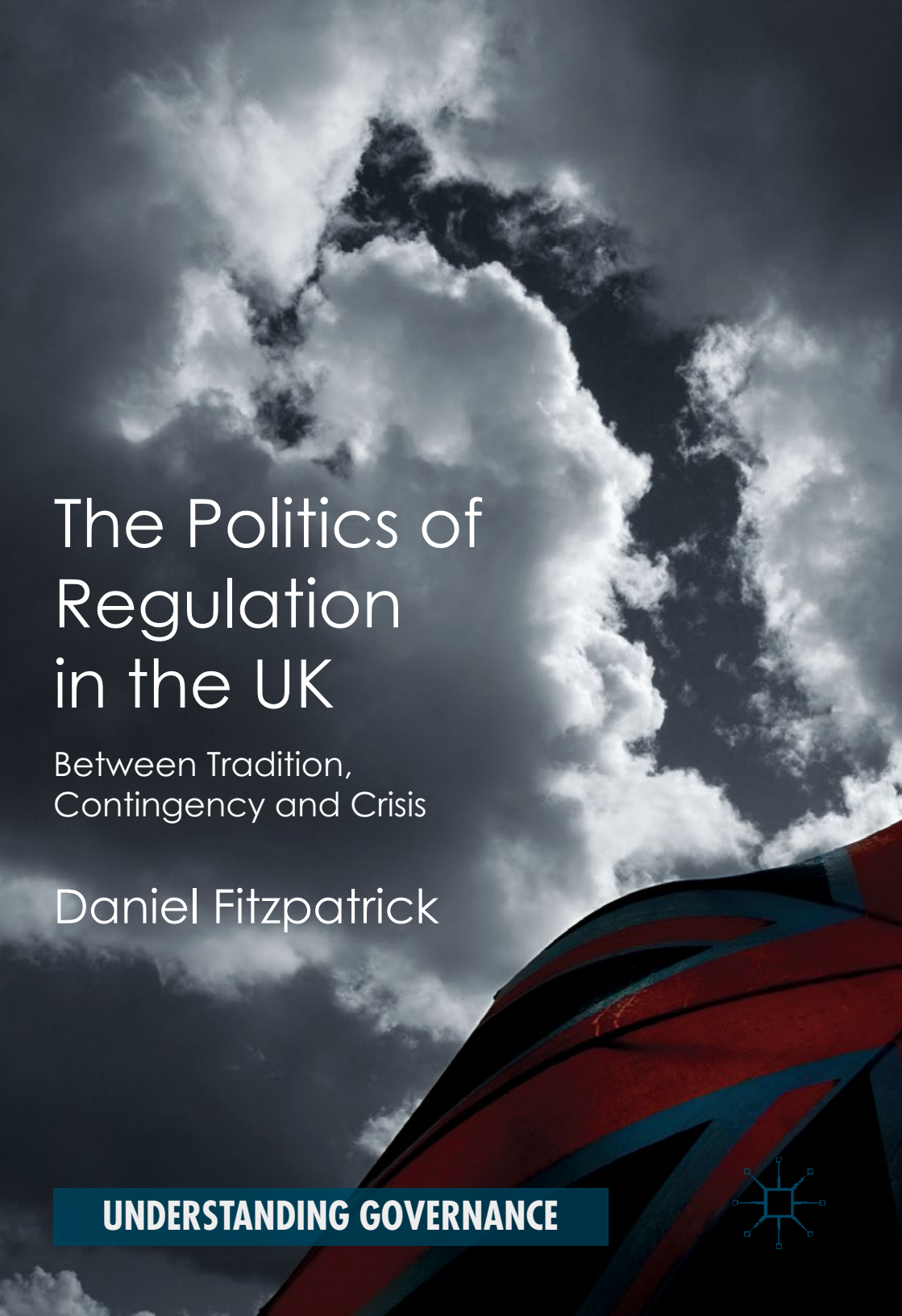

The Politics of Regulation in the UK

Between Tradition, Contingency and Crisis

Daniel Fitzpatrick

UNDERSTANDING GOVERNANCE

Understanding Governance

Series Editor

R.A.W. Rhodes
Professor of Government
University of Southampton, UK

Aims of the Series

Understanding Governance encompasses all theoretical approaches to the study of government and governance in advanced industrial democracies and the Commonwealth. It has three long-standing objectives: 1. To develop new theoretical approaches to explain changes in the role of the state; 2. To explain how and why that role has changed; and 3. To set the changes and their causes in comparative perspective. The origins of the series lie in the renowned Whitehall Research Programme funded by the Economic and Social Research Council. Since 1997, it has published some 26 books by the best known names in the field including Colin Hay, David Marsh, Edward Page, Guy Peters, R. A. W. Rhodes, David Richards, Martin Smith and Patrick Weller.

More information about this series at
http://www.springer.com/series/14394

Daniel Fitzpatrick

The Politics of Regulation in the UK

Between Tradition, Contingency and Crisis

palgrave
macmillan

Daniel Fitzpatrick
Department of Politics
University of Manchester
Manchester, United Kingdom

Understanding Governance
ISBN 978-1-137-46198-8 ISBN 978-1-137-46199-5 (eBook)
DOI 10.1057/978-1-137-46199-5

Library of Congress Control Number: 2016940523

Cover illustration: © DAVID BARRETT / Alamy Stock Photo

Printed on acid-free paper

This Palgrave Macmillan imprint is published by Springer Nature
The registered company is Macmillan Publishers Ltd. London

For Harvey

Acknowledgments

Like its subject matter, this book has had a long gestation. I first became interested in the politics of regulation after reading Mick Moran's work as an undergraduate at Liverpool. Given his influence on my research career it was a pleasure to finally meet him at the London School of Economics last summer. Before entering academia I worked in the public affairs department at BT and as a teacher in two secondary schools in Bolton. My observation of the different regulatory regimes in these sectors and the consequences, both intended and unintended, they have on individuals, systems and cultures provided me with a rich experience from to start thinking about the links between politics and regulation. Thank you to my former colleagues and students—this book owes something to all of you. There are a few people, however, to whom I would like to express special thanks. Firstly, I am indebted to Martin Smith and Dave Richards for their comments on the draft. I am also grateful to Sara Crowley-Vigneau and Rod Rhodes, as series editor, at Palgrave Macmillan for agreeing to commission the book. Thanks also to Jemima Warren at Palgrave for her encouragement, advice and patience in the final months. Finally, I am most grateful to my wife and family for their love, support and understanding over the last couple of years. No matter how many evasive answers I gave, they never tired of asking me: "how are you getting on with your book"? I always said I would consider it something of a personal triumph if the book was published before the Chilcot Report—it looks like I might just make it!.

Contents

PART I

Political and Regulatory Traditions

CHAPTER 1

Introduction: The Politics of Tradition

Introduction

On 3 August 2015, former UBS and Citigroup trader Tom Hayes was sentenced to 14 years in HM Prison Wandsworth for his key role in the rigging of the London Interbank Offered Rate (Libor). Hayes was found guilty of eight counts of conspiracy to defraud with respect to the Libor fixing scandal. In sentencing him, Mr Justice Cooke said that the tariff imposed was designed to send a message:

> to the world of banking [that] … The conduct involved here must be marked out as dishonest and wrong … The fact that others were doing the same as you is no excuse, nor is the fact that your immediate managers saw the benefit of what you were doing and condoned it and embraced it, if not encouraged it.

The prosecution of Hayes is an outlier in the normal operation of UK regulation. Historically, regulation in Britain has tended to emphasise informal 'cooperation between insiders, rather than of open adversarial conflict' (Moran 2003: 35). Regulators in Britain have traditionally shied away from the strict imposition of enforcement and sanctions, favouring strategies of persuasion and education instead (Vogel 1986). This culture of cooperation is premised on the Victorian ideal of the gentleman. This is the notion that 'economic actors were gentlemen, with claims to a

D. Fitzpatrick, *The Politics of Regulation in the UK*,
DOI 10.1057/978-1-137-46199-5_1

particular style of treatment by regulators, and with claims to gentlemanly standards that could deliver effective regulation without adversarial controls' (Moran 2003: 43). This 'gentlemanly ideal' gave rise to a regulatory approach that emphasised conciliation and cooperation with powerful interests in industry, the City and the professions in the nineteenth century. The consolidation of the overarching approach and style of regulation came to form the British regulatory tradition.

In this context, the prosecution of Tom Hayes is notable for three reasons. The first is the relative novelty of someone receiving a criminal (let alone custodial conviction) for a corporate or financial crime. In the conventional view, the vast majority of corporate illegality is not considered to constitute 'real' crime (Tombs 2015). Indeed, Hayes himself admitted that during the initial investigation by the UK's Serious Fraud Office: 'I didn't think about innocence or guilt.' Second, the trial exposed the degree to which the game of financial capitalism is, in reality, rigged. The Libor serves an important benchmark standard that is relied upon as a reference for financial contracts, including mortgages and student loans, worth over $300 trillion. The Libor fixing scandal contradicts the narrative that the maladies of the financial system are invariably due to high risk-taking behaviour of a few rogue traders, rather than systematic greed and malfeasance. According to this view, any emboldening of regulation or enforcement must be weighed up against the *costs* of 'stricter liability … Discouraging risk-taking altogether, in short, can be counterproductive' (The Economist 2013). The Libor scandal (and the rigging of its Euro and Tokyo equivalents) demonstrated that, in practice, capital 'does not operate or seek to operate according to free market principles … Despite paying lip-service … to the virtues of competition, it is not a discipline that all but a few business are willing to accept' (Clarke 2000: 39).

At the same time, the scandal of Libor—a self-selected, self-policing committee of the world's largest banks—also evidenced the extent to which the financial system still operates according to the subjective judgement and tacit knowledge of insiders in private 'club worlds'. While these private domains are now transnational, the prevailing world-view of this contemporary elite would be familiar to an observer of nineteenth-century high finance. The prosecution of Hayes, therefore, highlights the anachronism of a regulatory system that remains largely predicated on a Victorian notion of gentlemanly capitalism. To what extent is this tradition of regulation still relevant in the current era of crisis?

The concept of tradition is at the core of this book. The term tradition, derived from the Latin verb *tradere*, means to 'hand down' (Young 1988: 95). Tradition denotes 'crystallisations of the past which remain in the present' via our forebears (Young 1988: 142; Shils 2006: 12; Finlayson 2003: 664). The different manifestations of tradition are abundant, encompassing both the material—such as physical artefacts, paintings, landscapes and buildings—and the ideational, pertaining to systems of beliefs and values. Traditions are realised and reproduced through human action, via the repetition, interpretation and elaboration of practices and institutions. The concept of tradition, therefore, does leave room for agency: only living and knowing human beings can enact, reproduce, and modify traditions (Shils 2006). It is not the 'concrete actions' of procedures and institutions that are transmitted but the 'images of actions which they imply or present and the beliefs requiring, recommending, regulating, permitting, or prohibiting the re-enactment of those patterns' (Shils 2006: 12).

The reproduction of tradition, however, can be unconscious as well as intentional: 'Those who accept a tradition need not call it a tradition; its acceptability might be self-evident to them' (Shils 2006: 13). Nor it is necessary to assume that actors adhere to a tradition on the basis that it has a longer lineage. Shils (2006: 13) argues that although this 'quality of pastness' is a common feature of tradition, some traditions are simply taken for granted and acquire what March and Olsen (2004) call the 'logic of appropriateness'.

The concept of tradition is vital, therefore, to our understanding of change and continuity in the nature of politics and institutions. As Shils (2006: 328) points out: 'The connection that binds a society to its past can never die out completely; it is inherent in the nature of society.' Tradition is manifested in much practical continuity—such as the family, places, institutions, language—that are directly experienced in everyday life (Williams 1977: 116). In focusing on remnants of the past, tradition is often used interchangeably, in both everyday language and academic text, with both habit and custom. Hobsbawm and Ranger (2012: 2), however, point out that it is important not to conflate tradition with the notions of habit and custom. Tradition is distinguishable from habit, routine or convention because these are behaviours that have a personal quality, whereas tradition is always collective: 'individuals can have their own rituals, but traditions as such are group properties' (Giddens and Pierson 1998: 128). Custom, though referring to a pattern of repeated social behaviour, lacks

the 'extra measure of social inertia' that tradition involves (Young 1988: 96). Hobsbawm (1983: 3) argues that:

> the past, real or invented, to which … [traditions] refer, imposes fixed (normally formalized) practices, such as repetition. Custom in traditional societies has the double function of motor and fly wheel. It does not preclude innovation and change up to a point, though evidently the requirement that it must appear compatible or identical with precedent imposes substantial limitations on it.

It is important to recognise, however, that traditions are a source change, as well as continuity. It has been claimed that tradition is predisposed to continuity: 'It is a version of the past which is intended to connect and ratify the present' (Williams 1977: 116) and therefore 'makes for inertia and acceptance rather than pressure and conflict' (Miliband 1982: 2). In this sense, tradition can be seen as an intermediary between individuals and institutions, which creates a relationship between the past and the present (Popper 2014: 179–180). In offering 'ready-made solutions to problems' traditions constrain, whether consciously or unconsciously, the actions of individuals (Sztompka 1993: 65). The continuity of traditional political institutions and practice also reinforce a sense of national identity. As Rothman (cited in Rose 1990: 20) observes:

> The development of British social and political life has involved a uniquely British synthesis of traditional patterns and the forces that transformed them. The synthesis was possible not only because traditional British society was less 'sticky' than its counterpart elsewhere, but because its patterns had taken on a national form before their transformation began. The result has been an organic community with its own peculiar political institutions. No wonder … the British tend to regard their institutions as peculiarly their own, while both Americans and Frenchmen identify themselves with universal ideas applicable to all peoples.

Traditions, however, are not static and frozen in time, but 'living' phenomena (Williams 1977: 117) that are reproduced through the interpretations and actions of individuals. Traditions are often the subject of questioning and reflection in the light of current experience or directly challenged by alternative visions (Halpin et al. 1997: 6). As McAnulla claims, 'traditions do not impel us to stick to the status quo, there are opportunities to either accept elements of tradition or disregard them and

make adjustments' (2007: 9). Traditions are thus a source of change as well as continuity:

> they are modified when people select certain fragments of tradition for special emphasis and ignore others … they may disappear when objects are abandoned and ideas rejected or forgotten. Traditions may also be revitalized and reappear after long periods of decay. (Sztompka 1993: 61)

Although there is a general consensus concerning the ability of traditions to change, the question of why they change is contested in the social sciences. For some authors, the existence of multiple traditions makes the clash of competing ones inevitable (Sztompka 1993: 63). Examples of rival or competing traditions are numerous and include: colonial and indigenous traditions; the traditions of different social classes; and regional traditions and sectarian traditions. Sztompka (1993: 63) argues that the mutual clash, or more rarely the mutual support, of traditions invariably influences the content of both in a dialectical (Socratic) fashion. Halpin et al. (1997: 6), for example, highlight the conflict and reciprocal effect between the meritocratic tradition, which justifies the retention of private education and grammar schools, and the egalitarian tradition, championed by supporters of non-selective comprehensive schools, within the British education system. Tant (1993), in the context of the British political system, analyses the interplay between the dominant elitist tradition and challenges originating from a participatory, democratic tradition. For others, the source of change is a Hegelian internal dialectic of contradictory elements within the same tradition. Williams (1977: 121–123), writing from a Marxist perspective, emphasises the dynamic interplay between the dominant and the potentially challenging 'residual' elements of a single tradition. Likewise, Greenleaf (1983a, b) argues that conflicting libertarian and collectivist aspects comprise an internal dialectic within British politics.

The existence of traditions in British politics is tacitly accepted. In the study of British politics, as well as other social science disciplines, the notion of tradition is often invoked to describe or explain events or historical legacies and to argue in favour of a desired set of social or political goods. The concept of tradition can be descriptive, detailing 'the way we do stuff' (Finlayson 2003: 664), explanatory as 'an actively shaping force' (Williams 1977: 115) and normative, 'in that they are intended to influence the conduct of the audience to which they are addressed' (Shils 1981: 24).

Tradition, therefore, can be used not only to demonstrate what is done but also to explain *why* it is done and what *should* or *ought* to be done (Halpin et al. 1997: 5; MacIntyre 1984).

Whilst the centrality of tradition to political analysis is recognised, it is invariably undertheorised. The intuitive appeal of traditions has led to a tendency to view them as uncontested. As such, the impact of traditions on British politics and governance is underexplored. This is not to suggest that the concept of tradition is novel in political analysis. A diverse range of authors, employing various methodological and normative perspectives, have appealed to the role of traditions in their analysis of British politics (Hall 2011).

Much of the discussion in the UK has centred on the existence of a dominant governing paradigm and political culture referred to as the British political tradition (BPT). However, the notion of tradition is invariably used in a general sense, in which different conceptions of tradition are not made explicit and are often conflated. In the classical literature on the BPT, tradition is often used implicitly without any attempt to define what is meant by the term or theorise the concept of tradition itself. Moreover, the classical literature has tended to emphasise ideational consensus of political traditions rather than their contestation. In doing so, the development of the British state over time has been portrayed as both gradual and largely consensual, undervaluing the role played by conflict of the competing ideas and actors. The overly simplistic perspective is derived from an absence of theory on the concept of tradition and its influence on the development of the British state (McAnulla 2007). As such, the notion of tradition is frequently appealed to but rarely defined in political studies (McAnulla 2007: 2). Shils (1981: 2), who arguably offers the most substantive attempt to conceptualise tradition, claims that the 'long exile' of tradition 'from the substance of intellectual discourse has left its meaning in obscurity'.

Given its centrality to political analysis, how can one explain this theoretical lacuna on the politics of tradition? Part of the explanation can be found in the way tradition was largely colonialised by conservative philosophers, for whom it is a fundamental truth. In conservative political thought, tradition is seen as something to be accepted rather than explained. The conception of tradition in conservative political philosophy does not extend beyond the minimal definition that it constitutes a relationship between 'those who are living, those who are dead and those who are to be born' (Burke 1790: xix). For conservatives, tradition comprises

'the accumulated wisdom that... emerges organically from years of experience and trial and error' (McAnulla 2007: 3). According to this view, tradition should be accepted 'as something just given. You have to take it; you cannot rationalize it; it plays an important role in society, and you can only understand its significance and accept it' (Popper 2014: 162).

On this basis, conservatives argue that the longevity of tradition is the criteria by which its utility should be judged rather than abstract, rational principles. Conservative philosophers, such as Burke (1790) and later Oakeshott (1962), use tradition in a distinctly anti-rationalist way to dispel what they conceive as external threats to the British political system. For Burke, tradition was used as an effective weapon of stability and institutional continuity against the radical democratic ideas of the French Revolution. Writing in the early 1960s, Oakeshott (1962: 22) was critical of modern rationalism, which he argued had 'come to colour the ideas, not merely of one, but all political persuasions, and flow over every party line' in contemporary European politics. For Oakeshott, tradition, which was embodied by everyday behaviours and practices deeply embedded within the rituals of institutions, was distinct from ideology, which purported to be based upon rational principles (Gamble 1990; Kenny 1999). For conservatives, tradition was central to the nature of political activity. In this conservative view:

> politics is a product of practical engagements in the business of running a society, to be understood by history, not by reason; ideas are abridgements of experience, good or bad … not autonomous motivators of social change, still less remediated goals of political action. (Crick 1988: 210)

The virtues of tradition were inherent for conservatives, and therefore did not require theoretical reflection. The paradox of the conservative philosophy, however, is the claim that tradition—through accumulated wisdom, practical knowledge and a deferential culture—is superior to the rationalistic schemes of (reforming or revolutionary) liberals and socialists, is itself based on an inverted form of rationality (Eagleton 1996).

The false dichotomy between tradition and rationalism constructed by conservative political philosophy has been reinforced by the response of the rationalist, 'progressive' literature. The conservative notion of tradition has been attacked by liberal and radical scholars as a legitimising mythology for the status quo (McAnulla 2007: 3). However, instead of providing a vigorous theoretical critique of the conservative notion of

tradition, rationalists have largely treated the concept of tradition with contempt and chosen to ignore it. As Karl Popper (2014: 162) observes, rationalists are inclined to adopt an anti-traditionalist attitude, maintaining the stance that:

> I am not interested in tradition. I want to judge everything on its own merits; I want to find out its merits and demerits, and I want to do this quite independently of any tradition. I want to judge this with my own brain, not with the brains of other people who lived long ago.

In forwarding a radical, progressive agenda, rationalists tend to argue that 'Modernity always sets itself against tradition' (Giddens and Pierson 1998: 118). Progressive politics, rooted in the Enlightenment theory of rationality, has tended to entail a disavowal of tradition. Koselleck (2002: 230) argues that 'since the nineteenth century, it has become difficult to gain political legitimacy without being progressive at the same time'. In the era of modernity, the search for universal solutions to problems in politics, as well as other areas, has been preferred over 'answers coming from tradition or embedded practice' (Giddens 1994: 29). However, for scholars such as Shils, social science has been blinkered in its interpretation of modernity and guilty of neglecting the enduring centrality of tradition to politics and social life, relegating it to a 'residual category … [or] intellectual disturbance to be brushed away' (Shils 2006: 8; McAnulla 2007). As a result, rationalists have largely vacated the stage regarding the debate on tradition, leaving it to be the exclusive preserve of conservatives.

The conditions of late modernity, moreover, have accentuated the academic neglect of tradition. Indeed, the increasing interconnectedness of the world through the processes of globalisation, which have transformed or broken up the many rituals of tradition, has led some to declare 'the end of tradition' (Giddens and Pierson 1998: 207). However, as MacIntyre (1984: 222) highlights, tradition is not exclusive to conservatism but inclusive of an array of different beliefs and practices, ranging from 'rational' principles (such as in modern physics) to primordial practices (such as medievalism). Similarly, Shils (2006) argues that traditions are not the sole preserve of conservatives, highlighting the available texts of 'The Socialist Tradition', 'The Tradition of Modernity' and even the 'Tradition of the New'. In this sense, radical, rationalist and even postmodernist thinkers 'are traditionalists, just as conservatives are; it is simply that they adhere to entirely different traditions' (Eagleton 1996: ix).

If tradition is accepted as an inescapable aspect of social life, then it is necessary for political analysis to engage with the concept of tradition rather than ignore its explanatory potential. The need for a detailed theoretical and empirical consideration of tradition, moreover, is relevant regardless of the normative perspective adopted: conservatives aiming to defend the status quo must offer argument in favour of tradition; critical and progressive scholars, on the other hand, attempting to change politics or society must analyse how the status quo is maintained by tradition in order to promote alternative forms of political and social organisation. Even radical perspectives, such as Marxism, which demand a complete break with the status quo must analyse the impact of tradition, which Williams (1977: 115) states, 'is in practice the most evident expression of the dominant and hegemonic pressures and limits'.

Any attempt to conceptualise the impact of tradition must also recognise that it is 'is intimately bound up with power' (Giddens and Pierson 1998: 129). Tradition in this sense is seen to function in order to provide the legitimation of authority and hierarchy: 'tradition … can serve as a source of support for the exercise of power over others and for securing obedience to commands' (Halpin et al. 1997: 6). Weber's (1978) work highlights the role of tradition in laying the foundations for authority; that is, the recognised and accepted exercise of power (Sztompka 1993: 64). The justification of existing institutions and practices by conservatives has rested on an appeal to tradition (Burke 1790). The authority and legitimacy of traditional institutions, such as the Monarchy or the House of Lords, is typically based on their longevity. Indeed, the Westminster model, which is the traditional understanding of the British political system, is premised upon a conservative notion of tradition. The Westminster model is illustrated by reference to the traditional practices of British politics, such as the ministerial responsibility and an uncodified constitution, which enables it to survive while also facilitating its adaptation according to contemporary circumstances (McAnulla 2007: 3). Bevir (2000) observes that conservatives often seek to portray such traditions as 'natural' British characteristics, 'which are deemed to have emerged as organic expressions of the national psyche' when they are in fact the product of social struggle and contestation (Tant 1993: 57; Kenny 1999: 276). Individual actors within the political elite also appeal, whether consciously or subconsciously, to tradition because it legitimises their authority and power (Marsh et al. 2001).

The normative dimension of tradition, argues MacIntyre, means it inevitably involves a 'historically extended argument … through many generations' about what should or ought to be done (1984: 222). McIntyre (1984) highlights the false opposition between rationality and tradition; in order to survive traditions must always be at least partially constituted by a continuous argument about the goods and virtues of this practice. The need for ongoing rational argumentation means that living traditions will be embroiled in conflict and debate between traditionalists, who may be perceived as non-rational, and non-traditionalists, who will almost certainly be drawing upon an alternative tradition of thought. The institutional and political terrain on which this contestation occurs is not neutral, however; it takes place within a pattern of power relations and structured inequalities. The link between tradition and power is thus one reason why tradition exerts a constraining influence on change; because tradition supports and legitimises the authority of those in power, those interests endeavour to preserve that tradition. In other words, some traditions resonate more fully with their environment because they correspond or fit the asymmetrical structure and power relations of that environment. The idea that traditions themselves resonate in an asymmetrical manner is linked to, and supports, the notion that we can find dominant and competing traditions in society (Hall 2011: 262).

Regulation and Power

Regulation is therefore a question of power. In seeking to change the behaviour of organisations and individuals, regulation constitutes the exercise of power. This process is normally conceived in simple and observable terms: the regulator (the principal) alters the behaviour of the regulatee (the agent) in a deliberate fashion. Regulators can seek to change the regulatee's behaviour through directive, inducement, persuasion and sanction (or threat thereof). In casting the relationship between the regulator and the regulatee as a principal-agent problem, the existence of conflict between the two is assumed. The two parties are seen to have different interests and motivations. The relationship is depicted as adversarial, in theory at least.

The study of regulation, therefore, is implicitly based on a pluralist perspective of power. To paraphrase Dahl's classic axiom: the regulator has power over a regulatee when it can get the regulatee to do something that it would not otherwise do. In the regulation of business by the state, the

former is motivated by the accumulation of profit and the latter by the ostensible public interest. As such, regulatory power is exercised when the state can get business (studies of regulation invariably focus on private companies) to do something that is not driven by the profit motive. This can be manifested in a number of ways: for example, when the competition authority prevents the merger of two companies; an obligation to meet particular benchmark standards or safeguards for vulnerable customers; or, the imposition of new technology designed to alleviate the impact of negative externalities, such as pollution. The theory of regulatory capture, developed by economist George Stigler (1971), critiqued this sanguine public interest view of regulation. Stigler argues that big business is always able to subvert the regulatory process in its favour, to the detriment of consumers and small firms, due to its resource capacity and structural advantages for mobilising collective action.

Most studies of regulation adopt this 'one-dimensional' (Lukes 1974) view of power, notwithstanding behavioural analyses that have considered the roles played by different actors in shaping the regulatory agenda (notably Crenson's [1971] famous study of the 'un-politics of air pollution'). As a consequence of this simplistic view of power a distinction is usually made between public (i.e., state) and private regulation, with the main focus on the latter in advanced industrialised societies. However, the separation between state and private regulation is a false dichotomy. Virtually all forms of state regulation rely on self-regulation to some extent, while the state has always sought to create the conditions of trust in which private citizens can operate. This regulatory role is the 'main function of the state' in the capitalist society, 'one that long preceded the macroeconomic and redistributive agenda of the twentieth century' (Kaletsky 1996). Analysis of state regulation, however, often proceeds from a simplistic binary perspective of the state and economy and an implicitly pluralist, one-dimensional zero-sum understanding of power. This more often than not leads to a misconception of the political economy of regulation. As Tombs (2015: 181) observes there is a widespread assumption that regulation:

> automatically benefits general welfare, is antithetical to the interests of capitals, capitalists and capitalism, reflects the state as a neutral arbiter among competing interests, mistakes government intervention as representing the furtherance of popular, democratic control over elite interests and, equates regulation with government activity, and 'deregulation' as the withdrawal of such.

The policies, practice and outcomes of regulation are all subject to much subtler and relational effects of power. The relations of power involved in shaping the dominant ideas on what constitutes desirable and feasible levels of regulation have been largely ignored by most of the existing literature (Tombs 2015: 33). The role of ideas in constructing a particular hegemonic perspective—what Lukes (1974: 107) called 'invisible' power—on the nature and role of regulation in liberal economies has been underplayed, despite the importance of regulation to the normal functioning of capitalist societies.

Most of the scholarly writing on regulation concerns itself with the narrow task of improving regulation by finding 'practical solutions to practical problems' in a neo-functionalist manner. Even where research is more theoretical in scope, rather than technical per se, it is rarely critically engaged with the concept of power. More recent scholarship on regulation has been viewed through the conceptual lens of governance. Ironically, given the focus on the 'regulatory state',[1] a developed theory of the state has been largely absent from this regulatory governance literature (cf. Marsh et al. 2003). While there are notable exceptions (Migdal 2001), there is a paucity of research that considers the role played by regulation in extending the 'infrastructural power' (Mann 1984) of the state. The larger normative questions about the role regulation should play in securing social and environmental justice are also left underexplored. A broader discussion on regulation should make a contribution to some of the key questions facing contemporary liberal democracies: 'the cultural and ideological tension between individualism and communitarianism, the inescapable trade-offs between efficiency and equity, and the contest—real and imagined—between economic growth and environmental equality' (McGraw 1981).

At the heart of the regulatory debate should be the issue of the role of state in society and the economy. While instrumental in charting the rise of the regulatory state, the various sub-disciplines of political study, including critical political economy, have been too reticent in tackling these questions. The scholarly debate on regulation is dominated by economists, socio-legal theorists and, to less of an extent, criminologists. This is all the more surprising given the range of critical, counter-hegemonic scholars working in the broad field of political economy. Given that regulation is one of the key interfaces between the state and the market, where the exigencies of their symbiotic relationship manifest, it is perplexing that it does not receive closer attention.

Regulation and Tradition

The domination of economics and law has led to the marginalisation of other factors, such as social and cultural attitudes, institutional structures and political traditions, in the study of regulation. The dominance of positivism in Anglo-American political science and legal studies led to a rational–scientific view of public administration and regulation (Bevir and Rhodes 2007). As a result the academic debate on regulation has been too often prefixed with empirical accounts of the activities of street-level bureaucrats in the regulation of behaviour (Meidinger 1987), operating according to assumed, uncontested notions of legality, efficiency and rationality.

Research that explores how actors perceive, understand and interpret regulation according to their institutional and ideational environment is scarce. There are notable exceptions (Jordana and Levi-Faur 2004b; Bevir and Rhodes 2003; Moran 2003; Graham and Prosser 1991). Nevertheless, few studies have addressed the politics of regulation in the UK in a way that explicitly recognises the changing dynamics of political and regulatory traditions over time. Rather than downplay the role of ideas in shaping the contemporary nature of regulation in the UK, I seek to place them front and centre.

The evolution of regulation has been decisively shaped by a set of ideas about the role of the state—the British political tradition—that is derived from the world view and interests of the political and economic elites in Britain. Put simply, the BPT can be understood as an elitist conception of decision-making, in which ministers and senior civil servants act, or are at least perceived to, in the public interest. In response to the problems of conventional accounts, this book develops a conception of the BPT to offer a critical account of its influence on the regulatory structures in the UK as the ideational keystone of the British state.

Regulation and Crisis

If there is a crisis of regulation in the UK, to what extent can it be understood according to a range of challenges to the top-down, elitist paradigm of regulation; in other words the British regulatory tradition? I explore whether the contemporary problems for regulators are part of a longer-term cycle of regulatory crisis and innovation, or rather to a more profound crisis with the practice of politics in the UK more generally.

The lack of critical academic discourse belies the significance of regulation in the post-financial crisis landscape. If there was ever to be a critical juncture for regulatory power of the state, then surely 2008 was an opportune time. For a brief period, it looked like the financial crisis and the subsequent critique of the regulatory regime that at best was acquiescent, or at worst facilitated it, had irrevocably changed the intellectual and political landscape. No longer was the study of regulation confined to the domain of low politics, populated by technocrats, but scrutinised by elected politicians, and the subject of the front pages rather than the financial pages. The target in peoples' sights was not regulation per se, but a particular variant of light-touch regulation that had come to dominate the Anglo-liberal approach to supervising the City of London and Wall Street. In the wake of the crisis, Stelzer concluded that 'It is not much of an exaggeration to say that capitalism as we have known it is no more, and that a New Capitalism is in the process of creation' (2008: 2–3). For Stelzer ([2008]: 2), a key feature of the 'New Capitalism' is the replacement of the bias in favour of deregulation with a bias in favour of more regulation.

In Britain, the financial crisis was marked by the first run on a bank for 140 years and followed by the socialisation of huge sums of private debt via interventions to bail out the banks, protect depositors and pour liquidity into the UK economy through quantitative easing. At its peak in 2009, the UK government had committed to spending £1.162 trillion to stabilise the banking sector; although by March 2011 this figure had fallen to £456.33 billion, it still represented approximately 31 % of GDP (NAO 2011). Post-2008, the claim that the British regulatory state is in crisis has become almost axiomatic.

Despite the magnitude of this intervention and the complete *volte-face* in the relationship between the state and the financial sector, the post-crisis literature remains characterised by a realism on the fundamental constraints of the state to regulate in an effective and benign manner. The response, so far, has been shallow and insular, focused on fine-tuning the existing paradigm rather than engaging in a broader questioning of the naturalised assumptions underpinning it. The notion that the crisis would lead to an acceleration of the trend towards what has been labelled as 'regulatory capitalism' (Jordana and Levi-Faur 2004a) and 'regulocracy' (Braithwaite 2008) was premature. Although the financial crisis led many to call for a reappraisal of the notion that neoliberalism is an unambiguously good thing, others (Crouch 2011) have observed that there has not been a fundamental change in the nature of state–market relations since 2008.

The financial crisis did, however, precipitate a subsequent discursive crisis of regulation, strategically narrated by political actors in the UK and elsewhere. The failure of the financial regulation regime to anticipate, prevent or manage the crisis in 2007 and 2008 was a catalyst for a much broader discussion on the future of the regulatory state. Although initially viewed as constituting a crisis *for* regulation, it later became constructed as a crisis *of* regulation. However, within this discourse of regulatory crisis a paradox has emerged: despite the increasing contestation of the principles underpinning the regulatory state, its institutions and practices continue to be firmly embedded within the governance of the British state. I want to focus on this central puzzle: if regulation is in crisis why does it continue to play a central role in the governance of the UK?

Of course, this debate on the future viability of the regulatory state is not limited to the UK. Conversations abound on whether this 'near universal policy trend' (Lodge and Wegrich 2012), characterised by the privatisation of public services, delegation to quasi-autonomous regulatory agencies and the formalisation of relationship between state and non-state actors in different sectors, has reached its end. Moreover, in the midst of the European sovereign debt crisis, which has witnessed major interventions of fiscal stabilisation and redistribution by the European Central Bank (ECB), the sustainability of Majone's (1994) conception of the European regulatory state has been questioned (Caporaso et al. 2014; Joerges and Glinski 2014). At the global level, the discussion about how to create more robust international architecture of financial regulation to replace what Strange (1999) dubbed the nationally bound system of 'Westfailure' has been reignited, with some renewing calls for the establishment of a 'Bretton Woods II' (Mattoo and Subramanian 2009). However, within this burgeoning debate on the global governance of transnational capital it is necessary to understand the dynamics of this debate in the British context. In particular, notwithstanding the multitude of influences beyond national borders, to what degree can the supposed crisis of regulation be considered a specifically British crisis?

If we are in an era of regulatory crisis, what is the nature and origins of the crisis? In this book, we will explore how different challenges, some perceived and narrated as crises, have shaped the character and scope of regulation in the UK over the last four decades. Crises are usually conceptualised in one of two ways: either as a pivotal 'life or death moment' when a decision must be made in order to preserve the life of the patient;

or as a gradual, but seemingly terminal, decline of an institution, culture or practice. These are often used interchangeably, without precise clarity as to their exact application.

The particular form and content of state regulation has evolved over time, punctuated by moments of crisis. In many ways, regulation and crises are natural bedfellows. In moments of crisis, when the fabric of society is threatened, states (especially liberal democratic states with high public expectations placed upon them) need to act. Regulation has become a matter of recourse in these circumstances. Braithwaite (2008) observes that major regulatory innovation (and invariable expansion) often follows crises: for example, the South Sea Bubble Act 1720; the Wall Street crash in 1929; the stock market crash in 1987; the Asian financial crisis in 1997–98; and the Sarbanes–Oxley affair in 2000–01. The regulatory state in the UK has developed through a series of 'boundary conflicts' (Lodge 2014) between realms of politics and delegated governance, in which long periods of relative stability have been punctuated by moments of crisis, contingency and intense politicisation.

The fallout from the near collapse of the financial sector in the UK is part of a bigger story about the failures of the regulatory system in Britain to adequately adapt to changing economic, political and social circumstances, both home and abroad. In this sense, the contemporary crisis of regulation has its origins in the decisions taken and not taken following the last major systemic crisis in British politics in the mid- to late 1970s. The growth of the regulatory state in the UK is often viewed as a deliberate strategy to depoliticise aspects of public service delivery (Flinders 2008). According to this view of delegated governance, regulation is often depicted as technocratic exercise and the exclusive domain of appointed experts. The neoliberal vision of specialised regulatory agencies providing depoliticised expert decision-making, detached from political discretion, was discredited in the aftermath of the collapse of financial markets in 2008. This neoliberal tradition of regulation had itself emerged out of an earlier crisis: the failure of the informal 'club government' in 1970s (Moran 2003). The belief that 'command and control' style regulation created perverse incentives and undesirable outcomes in terms of efficiency led to a search for alternative modes of regulation. The creation of economic regulators for the privatised public utilities was an ill-conceived and haphazard attempt to bring this neoliberal vision of regulation to fruition, ostensibly based on greater independence, openness, non-discretionary measures and accountability.

This economistic model of regulation was increasingly challenged, particularly after the election of New Labour in 1997, by a growing politicisation. Beyond public utilities, an increasing proportion of the former 'club world' has been subject to enforced self-regulation and increased codification that seem to contravene the tenets of the British regulatory tradition. However, that is not to suggest that all social and economic domains have been colonised by the state; the response to the crisis of club regulation was extensive, but not all-encompassing. Sport, and in particular football, is an area where a series of crises have led to only a partial engagement of the state in regulating its governance. In this context alternative modes of regulation, such as smart regulation and risk-based regulation, have emerged that seek to move beyond familiar options of either light-touch approach, on the one hand, or informal 'club government' subject to political interference, on the other. Environmental regulation is an area where these new modes of regulation have been downloaded across a range of national contexts, particularly facilitated by the European Union (EU) (see Krieger 2014).

Overview of the Book

The book is organised in two parts. Part I unpacks the dominant approach to regulation in the UK by locating the practice of regulation within the constraints of its wider political and institutional context. The first of these three chapters explores how the development of regulation in the UK has been shaped by its origins in the nineteenth century and the dominant paradigms of the Westminster model and the British political tradition. Chapter 3 explains how this discursive context was seen to give rise to particular 'British model' of regulation, reflecting wider Whiggish notions of exceptionalism.

Part II adopts a more thematic and sectoral focus to offer an account of how challenges and pressures for change from neoliberalism, Europe, critical citizens and the global financial system have impacted regulation of public utilities, the environment, sport and the banking sector. Part II, therefore, takes a multidimensional perspective that examines how the British regulatory tradition has faced challenges from within, above and below the state. The particular sectors explored were chosen to provide a diverse range of domains through which to explore the changing nature of the regulatory state in the UK. It goes without saying, however, that this list is by no means exhaustive—foods standards, the National Health

Service (NHS), the professions, the police, education and children services, are all areas internal and external to the state that would provide fertile ground on which to develop a more nuanced understanding on the current state of regulation in the UK. Nevertheless, the aim of the undertaking was to be able to reflect on the cross-sectional character of regulation in the post-crisis era, in order to respond to the questions posed at the outset of this introductory chapter as well as develop new ones.

Note

1. The term 'regulatory state' is the label given to characterise the growing use range of mechanisms—including audit, monitoring and enforcement—exercised by quasi-independent public bodies by the state in recent decades. It is used to denote shift away from the traditional redistributive policy instruments of the welfare state and a reconfiguration of the relations between public and private, state and citizen, and politics and public administration.

Bibliography

Bevir, M. (2000). On tradition. *Humanitas, 13*(2), 28.

Bevir, M., & Rhodes, R. A. W. (2003). *Interpreting British governance*. Psychology Press.

Bevir, M., & Rhodes, R. (2007). Traditions of political science in contemporary Britain. Adcock, R., Bevir, M. and Stimson, S.C. Modern political science: Anglo-American exchanges since 1880. Princeton, NJ: Princeton University Press.

Braithwaite, J. (2008). *Regulatory capitalism: How it works, ideas for making it work better*. Edward Elgar Publishing.

Burke, E. (1790). *Reflections on the revolution in France: And on the proceedings in certain societies in London relative to that event. In a letter intended to have been sent to a gentleman in Paris*. J. Dodsley.

Caporaso, J. A., Kim, M. H., Durrett, W. N., & Wesley, R. B. (2015). Still a regulatory state? The European Union and the financial crisis. *Journal of European Public Policy, 22*(7), 889–907.

Clarke, M. (2000). *Regulation: The social control of business between law and politics*. Macmillan.

Crick, B. (1988). British political tradition. *Government and Opposition, 23*(2), 210–219.

Crenson, M. (1971). *The un-politics of air pollution*. Baltimore, MD: Johns Hopkins University Press.

Crouch, C. (2011). *The strange non-death of neo-liberalism*. Polity Press.
Eagleton, T. (1996). *Literary theory: An introduction*. University of Minnesota Press.
Finlayson, A. (2003). *Contemporary political thought: A reader and guide*. NYU Press.
Flinders, M. (2008). *Delegated Governance and the British State: Walking without Order: Walking without Order*. Oxford: Oxford University Press.
Gamble, A. (1990). Theories of British politics. *Political Studies, 38*(3), 404–420.
Giddens, A. (1994). *Beyond left and right: The future of radical politics*. Stanford University Press.
Giddens, A., & Pierson, C. (1998). *Conversations with Anthony Giddens: Making sense of modernity*. Stanford University Press.
Graham, C., & Prosser, T. (1991). *Privatizing public enterprises: Constitutions, the state and regulation in comparative perspective*. Oxford [England]: Clarendon Press.
Greenleaf, W. H. (1983a). *The British political tradition: The rise of collectivism. Volume One*. Routledge.
Greenleaf, W. H. (1983b). *The British ideological tradition: Volume Two, The ideological heritage*. London: Methuen.
Hall, M. (2011). *Political traditions and UK politics*. Palgrave Macmillan.
Halpin, D., Power, S., & Fitz, J. (1997). In the grip of the past? Tradition, traditionalism and contemporary schooling. *International Studies in Sociology of Education, 7*(1), 3–20.
Hobsbawm, E., & Ranger, T. (2012). *The invention of tradition*. Cambridge University Press.
Joerges, C., & Glinski, C. (Eds.). (2014). *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism Versus Democratic Governance*. Bloomsbury Publishing.
Jordana, J., & Levi-Faur, D. (2004a). The politics of regulation in the age of governance. In Jordana, J. & Levi-Faur, D. (Eds.) *The politics of regulation: Institutions and regulatory reforms for the age of governance* (pp. 1–28). London: Edward Elgar.
Jordana, J., & Levi-Faur, D. (2004b). *The politics of regulation: Institutions and regulatory reforms for the age of governance*. London: Edward Elgar Publishing.
Kaletsky, A. (1996). *The Times*, March 26.
Kenny, M. (1999). Ideas, ideologies and British tradition. In I. Holliday, A. Gamble, & G. Parry (Eds.) *Fundamentals in British politics*. Basingstoke: Palgrave.
Krieger, K. (2013). The limits and variety of risk-based governance: The case of flood management in Germany and England. *Regulation & Governance, 7*(2), 236–257.

Koselleck, R. (2002). *The practice of conceptual history: Timing history, spacing concepts*. Stanford University Press.
Lodge, M. (2014). The British Regulatory State under the coalition government: Volatile stability continued. *The Political Quarterly, 85*(2), 143–147.
Lodge, M., & Wegrich, K. (2012). *The Regulatory State in Crisis: A public administration moment?*. London School of Economics and Political Science, Department of Government and Centre for Analysis of Risk and Regulation, disponible en: http://goo. gl C, 4078.
Lukes, S. (1974). Power: A radical view. London: Macmillan.
MacIntyre, A. (1984). The virtues, the unity of a human life, and the concept of a tradition. In Sandel, M. (Ed.), *Liberalism and Its Critics,* New York: New York University Press, 125–148.
Majone, G. (1994). The rise of the regulatory state in Europe. *West European Politics, 17*(3), 77–101.
Mann, M. (1984). The autonomous power of the state: Its origins, mechanisms and results. *European Journal of Sociology, 25*(02), 185–213.
Mattoo, A., & Subramanian, A. (2009). From Doha to the next Bretton Woods. *Foreign Affairs, 88*(1), 15–26.
March, J. G., & Olsen, J. P. (2004). *The logic of appropriateness*. Arena.
Marsh, D., Richards, D., & Smith, M. (2003). Unequal plurality: Towards an asymmetric power model of British politics. *Government and Opposition, 38*(3), 306–332.
Marsh, D., Richards, D. D., & Smith, M. J. (2001). *Changing patterns of governance in the United Kingdom: Reinventing Whitehall?*. Palgrave.
McAnulla, S. (2007). Understanding tradition in British politics and beyond. *Working Paper No. (24)*, University of Leeds Polis.
McGraw, T. K. (1981). *Regulation in perspective*. Cambridge, MA: Harvard University Press.
Meidinger, E. (1987). Regulatory culture: A theoretical outline*. *Law & Policy, 9*(4), 355–386.
Migdal, J. S. (2001). *State in society: Studying how states and societies transform and constitute one another*. Cambridge University Press.
Miliband, R. (1982). *Capitalist democracy in Britain*. London: Oxford University Press.
Moran, M. (2003). *The British Regulatory State: High modernism and hyper-innovation: High modernism and hyper-innovation*. Oxford University Press.
National Audit Office [NAO] (2011). The financial stability interventions, London: HM Treasury. http://www.nao.org.uk/wp-content/uploads/2011/07/HMT_account_2010_2011.pdf
Oakeshott, M. (1962). Rationalism in Politics and Other Essays. Oxford: Oxford University Press.

Popper, K. (2014). *Conjectures and refutations: The growth of scientific knowledge*. Routledge.
Rose, C. (1990). *The dirty man of Europe: The Great British pollution scandal*. Simon & Schuster.
Shils, E. (1981). *Tradition Chicago*. University of Chicago Press.
Shils, E. (2006). *Tradition*. University of Chicago Press.
Stelzer, I. (2008). The new capitalism. Washington, D.C.: Hudson institute. Availablehere:http://www.iea.org.uk/publications/research/a-review-of-privatisation-and-regulation-experience-in-britain
Stigler, G. J. (1971). The theory of economic regulation. *The Bell Journal of Economics and Management Science,* 2/1 (Spring 1971) 3–21.
Strange, S. (1999). The westfailure system. *Review of International Studies, 25*(03), 345–354.
Sztompka, P. (1993). The sociology of social change. Oxford: Blackwell.
Tant, A. P. (1993). *British government: The triumph of elitism: A study of the British political tradition and its major challenges*. Dartmouth Publishing Company.
The Economist. (2013). Why have so few bankers gone to jail?. *The Economist*.
Tombs, S. (2015). *Social protection after the crisis: Regulation without enforcement*. Policy Press.
Vogel, D. (1986). National styles of regulation: Environmental policy in Great Britain and the United States. Ithaca, NY: Cornell University Press.
Weber, M. (1978). *Economy and society: An outline of interpretive sociology*. University of California Press.
Williams, R. (1977). *Marxism and literature*. Oxford Paperbacks.
Young, M. (1988). The metronomic society: Natural rhythms and human timetables. Cambridge: Harvard University Press.

CHAPTER 2

The British Political Tradition

Introduction

The central thesis of this book rests on two key claims. First, I argue that a dominant political tradition prevails in the UK, based on a centralised and hierarchical conception of power. Second, this BPT shapes the role, outlook and behaviour of both state and non-state actors engaged in the regulation of social and economic life. In this chapter I argue that the British polity (including the regulatory arena) is underpinned by a 'governing code' that privileges an elitist conception of democracy (Diamond 2013: 21). The aim is to provide a theoretical framework in which the competing influence of ideas, traditions and institutions on UK regulation can be recognised and understood. The chapter considers the key contributions to the literature on the BPT, focusing in particular on the 'classical wave' of Birch (1964), Beer (1965) and Greenleaf (1983a, b, 1987), followed by the more recent 'critical' accounts of Marsh, Tant and Evans (Diamond 2013; Hall 2011).

The notion of a dominant BPT is emergent and contested. It is also multifaceted, with Gamble defining the BPT as 'a constitutional doctrine, a conception of the state and an interpretation of history' (1990: 406). Rather than a single, unified concept, the term 'British political tradition' denotes a diverse body of literature that is characterised by some key differences as well as several common assumptions. At the core of this literature

D. Fitzpatrick, *The Politics of Regulation in the UK*,
DOI 10.1057/978-1-137-46199-5_2

is a shared desire to focus on the role played by ideas in the development of British politics over time. Underlying the BPT literature is an assumption that ideas have heuristic value for explaining political phenomena: 'shaping actors perceptions of their "interests" and … generating frameworks through which the political world that they inhabit is made comprehensible and alternative possibilities imagined' (Kenny 1999: 275).

The term 'political tradition' is used as a descriptive label for a set of ideas and values about democracy; the BPT, therefore, comprises the body of ideas that underpin the institutions and processes of British government. What it offers is a narrative of democracy in Britain (Marsh and Hall 2007: 220). In illuminating the role of ideas and values in the processes of change and continuity, it provides a corrective to the largely descriptive accounts of institutions, centred either explicitly or implicitly on the Westminster model, that have tended to monopolise conventional understandings of how British politics works (Hall 2011).

Along with the Westminster model, as its institutional corollary, the BPT has been employed as a key organising perspective in the study of British politics. Organising perspectives are said to 'provide a framework for analysis, a map of how things relate, [and] a set of research questions' (Gamble 1990). Their importance as an explanatory framework is frequently stressed in research and textbooks on the study of British politics (Greenleaf 1983b; Garnett and Lynch 2014). However, an endemic weakness of much of the existing research of the British state, which is indicative of the study of British politics more generally, is that it is largely atheoretical (Marsh et al. 2001: 4–5). As Greenleaf (1987: 7) observes, the result is that the study of British politics 'too often takes the form of a series of almost discrete studies of specific topics or institutions with little or no attempt to present an overall framework of analysis or review'.

The broad, overarching scope of the BPT means it has been utilised in a number of different ways by a range of authors with contrasting conceptual, methodological and normative perspectives. In examining the literature on the BPT, a key distinction can be made between the 'classical' and 'critical' waves of scholarship (Marsh and Hall 2007' Hall 2011; Diamond 2013). The former group of authors—comprising Birch (1964), Beer (1965) and Greenleaf (1983a, b, 1987)—offers an affirmatory view of the dominant tradition in British politics. Whilst these authors each provide a different approach to the BPT, they all are underpinned by a conservative conception of tradition. As a result, in this classical literature the dominant political tradition of British politics is seen as 'natural' and accepted as having a virtuous effect on British politics. The 'critical wave'—associated

with Tant (1993), Evans (1995) and Marsh et al. (2001, 2003)—has questioned the classical approach for taking the 'naturalised' view of the traditional institutions and practices of British politics. They have argued that the underlying conservative understanding of tradition in the classical wave has led to a tendency to view the BPT as an organic and benign phenomenon rather than the product of political contestation, struggle and contingency, which is used to conceal or legitimise structured hierarchy and inequality (Diamond 2013; Kenny 1999).

The classical wave builds on Oakeshott's (1962) valorisation of tradition in British political life, which he distinguishes from ideology. For Oakeshott, the BPT is not an ideology or doctrine, but a set of intertwined practices, values and ideas (Hall, 2011). Although the notion of the BPT highlights the significant effect of ideas on political practice, it is often characterised in the classical literature as 'a non-ideological entity and sometimes as trans-ideological' (Kenny 1999: 276). Oakeshott claimed that it was characterised by: 'a preference for the pragmatic handling of social problems, an aversion to the intrusions of rationalist dogma and a commitment to the rule of law which enables the flourishing of what he termed a "vital civil association"' (Kenny 1999: 278). The depiction of the BPT as 'natural' (Tant 1993) and 'authentic' phenomena, which is opposed to ideologies that are 'alien imports into domestic political life' (Kenny 1999: 276) was a decisive influence on the classical wave of authors on the BPT, to which we now turn.

The Classical Wave

Informed by a conservative understanding of tradition, the classical literature tends to extol the virtues of the constitutional and political settlement in the UK, which is depicted as providing continuity, stability and legitimacy in comparison to the more tumultuous nature of political development on the European continent (Diamond 2013). Within this sanguine view of the British polity, the classical literature considers the consolidation of a 'strong state' to be a distinct advantage. This is linked to the exceptionalism of the UK according to a Whiggish interpretation of history.

Birch: Representative and Responsible Government

Birch (1964) seeks to account for the dominant and overarching approach to British politics and institutions through an understanding of

the theories of representation and responsibility. In seeking to formulate an 'understanding of the British constitution', Birch's work is idealist: it is primarily concerned with the 'values, doctrines and traditions' that shape peoples' behaviour (1964: 22). For Birch, ideas, which he conceives as emerging in response to a particular set of circumstances, are the means through which British politics is constituted. Birch argues that the ideas, or theories, of representation and responsibility are central to any understanding of a democratic political system. The notion of representation is concerned with the means of how, and the extent to which, the views, preferences and demographic composition of the electorate should be reflected in the political process. Birch (1979: 14–15) identifies three types of representation, distinguishing between:

1. representation as *delegation*: where the representative acts 'an agent or delegate … whose function is to protect and if possible advance the interests of an individual or group on whose behalf he is acting—irrespective of who they are, how they are chosen, or how much discretion they are allowed, their function is to look after the interests of the organisation, group or person they represent' (Birch 1964: 14);
2. *demographic* representation: where the assembly can be said to reflect a demographic microcosm of the electorate in descriptive terms; and
3. *elective* representation: where an assembly is representative to the extent that it is freely and fairly elected.

Historically, it is the concept of 'elective' representation that has prevailed in Britain. This is a minimal understanding of representation, which is concerned with the selection rather than the function of representatives (Tant 1993: 69). Birch (1979: 15) argues that the more encompassing conception of elected representatives 'as an agent or delegate' who have 'some obligation … to advance the interests of their electors' does not resonate with the evolution of democracy in Britain. The dominant approach to representation in British politics has been framed by the debates between the Old Tory and Whig positions on the authority of the monarch vis-à-vis Parliament in the late eighteenth and early nineteenth centuries (Birch 1964). Despite their differences, both Tories and Whigs were firmly against increasing popular participation in the political process, and instead stressed the need to preserve order and stability with

the emphasis on strong and efficient, rather than responsive, government (Marsh and Hall 2007: 222). In the latter half of the nineteenth century, the debate regarding representation continued between Liberals and Conservatives, in the context of an increasingly enfranchised population. Birch (1964: 64–66) claims that the Victorian period witnessed a consolidation of the liberal view, of which parliamentary sovereignty, accountability and the rule of law are central tenets. However, even for the Liberals who advocated the extension of the franchise, 'the member of the legislature was not a delegate sent merely to reflect the will of the people, he was a representative charged with deliberation on the common good' (Birch 1964: 33).

In the dominant liberal perspective, it was not seen as essential or desirable that Parliament be a microcosm of the society it represents. For Birch, the ubiquity of liberal language—such as 'parliamentary sovereignty', 'cabinet government' (Blauvelt 1902, 1904) and 'responsible government' (Roberts 1966)—in contemporary debates about the British state and constitution demonstrates the 'Liberal stamp … [on] the mythology of the constitution as a whole' (Birch 1964: 237). Other perspectives, offering alternative theories of representation, such as populism, have enjoyed little traction. Birch (1964: 80–130) argues populist theories had little success because they failed to adequately answer how Parliament, in a system of representation based on canvasses, frequent elections and binding candidates, could function as both the arena for conflict resolution and the arbiter of the national interest. While it is implicit in his analysis, Birch fails to theorise the impact of the dominant liberal view in constraining the opportunities for populist theories of representation to take hold.

The conception of representative democracy in the BPT is thus a limited liberal one (Marsh and Hall 2007: 222). In Birch's perspective, the electorate in Britain is envisaged as performing a minimal and largely passive role, with elected representatives and government enjoying wide discretionary power and independence (Tant 1993: 69). The elective notion of representation is the prevailing ideational prism through which MPs have understood their role as representatives of the people. Birch points out that 'no serious politician' has ever argued that MPs should act as delegates 'that are bound by specific instructions from their constituents and subject to recall if they do not follow these instructions' (1964: 227). Moreover, although the calls for a more representative Parliament in demographic terms have become more pronounced in recent years, fundamental constitutional reform remains unlikely (see, e.g., the Royal Commission on the Reform of the House of Lords, Cm. 4534).

The *limited*, *liberal conception of representation* has been counterbalanced by the notion that representatives will govern responsibly. Although Birch claims that the question of responsibility did not become a prominent feature of constitutional debate until the twentieth century, a particular notion of responsibility was implicit in the Tory, Whig and Liberal discourses on representation in the late eighteenth and nineteenth centuries. Reflecting the debates on representation, the Tories believed that authority rested with the monarch; Whigs argued that authority was shared between the monarch and Parliament; and the Liberals claimed that authority was exclusive to Parliament (Marsh and Hall 2007: 222). By the late nineteenth century, however, the debate had shifted. All parties accepted the authority of the House of Commons; the key question concerned the role of the House of Lords and the relationship between the government and Parliament (Marsh and Hall 2007: 223). Broadly speaking, the Liberals stressed that responsible government would be achieved through accountability to Parliament (via the principles of parliamentary sovereignty and ministerial responsibility), whereas Conservatives emphasised the need for a strong executive that was able to govern responsibly (Hall, 2011). As far as responsibility is concerned, Birch (1964) again distinguishes between three types of responsible government:

- a government which is *responsive* to the demands and shifts in public opinion (Birch 1964: 18);
- a government which is *accountable*, not only to the electorate at elections, but to an effective elected assembly between elections (Birch 1964: 20); and
- a government which takes *strong and decisive*, even if unpopular, action on behalf of its citizens.
  (Marsh and Hall 2007: 221)

The conception of responsible government as one that is responsive to public demands and opinion is implicitly linked to the notion of representation as delegation; for a representative who acts a delegate is bound to be responsive to the views and wishes of their electors. As a result, responsive government is in contradiction to the 'conventions of [British] politics' (Birch 1979: 15). In the second example, responsible government is taken to mean accountable government. In the BPT, however, this

has been a narrow and limited conception of accountability. Through the mechanisms of ministerial responsibility and collective cabinet accountability, the government is seen to be answerable to Parliament rather than directly accountable to the people. Therefore, even if one takes these principles as read, 'at best it is accountability to the "representatives" of the people … rather than popular accountability of the governors to the governed' (Tant 1993: 71). Again, even the liberal view in the nineteenth century did not advocate that government should be primarily responsive to the electorate but instead should be accountable to Parliament, which represented the nation (Marsh and Hall 2007: 223).

Since Parliament's role to scrutinise the government is enshrined in the established institutional practices of British politics, according to this classical view, there is little reason for the 'unsophisticated public' to be well-informed or engaged with public policy matters (Tant 1993: 72). Consequently, the political elite in Britain have invariably deemed it 'irresponsible' to supply the public with too much information, thereby justifying the need for official secrecy (ibid.). The third sense of the term suggests that government is a moral and responsible guardian of the public interest: 'ministers in office are responsible for seeing that the government pursues a *wise* policy, whether or not what they do meets with the immediate approval of the public' (Birch 1964: 18–19, my emphasis). The government, therefore, is responsible for making decisions and implementing policy in the interests of the *whole* nation. Thus, the elitism of the BPT is viewed as distinctly paternalistic; reflecting both One-Nation Conservatism and democratic collectivism of both Tories and Fabians alike, in which ministers and 'officials can be trusted to act in the public good' (Marsh et al. 2001: 30; Marquand 1992).

The notion of responsible government as 'strong, initiatory and decisive' (Tant 1993: 70–72), which is not 'deterred from pursuing policies which it thinks are right by the fact that they are unpopular' (Birch 1964: 244), has prevailed in British politics. British politics is thus based on a *conservative notion of responsibility*. For Birch (1964: 241–245), the conservative theory of responsibility is supported by five key values of the British state:

- the neutrality of the civil service;
- the anonymity of the civil service;
- a culture of secrecy, based on the widely held belief that 'it is better not to probe too deeply when things go wrong';

- the notion of 'strong government', which 'should have both the powers and the ability to provide strong leadership' and play 'a major part in determining the nature of political responsibility in Britain'; and
- a system of strong party discipline.

What unites both (liberal) limited elective representation and (conservative) strong, initiatory and decisive government is the notion that 'government knows best'; in other words, it is the government that is best qualified to make decisions in the 'public interest'. The role of political leadership is strongly emphasised in British politics: 'leaders had a duty to lead and assumed that followers would follow if leaders fulfilled that duty' (Marquand 2010: 60). In terms of its priorities, Birch (1964: 245) states that 'the British political tradition would clearly determine the order as, first consistency, prudence and leadership, second, accountability to parliament and the electorate, and third, responsiveness to public opinions and demands'. Although the legitimising rationale of the Labour Party was based on professionalism, training and expertise, opposed to the innate wisdom of tradition in Burkean conservative philosophy, the result was the same: an essentially elitist view of the state (Marquand 2010). The BPT, therefore, is based on a conservative notion of responsibility and a related limited liberal conception of representation: 'The stress in the British political system is on strong, rather than responsive, government, and on elite, or leadership, democracy, rather than participatory democracy' (Marsh and Hall 2007: 224).

For Birch, the conservative notion of responsibility and a limited liberal conception of representation that comprise the BPT are virtues in the British political system to be celebrated rather than criticised. Birch (1964: 13) states:

> Everyone knows that the British Constitution provides for a system of representative and responsible government. These characteristics are almost universally regarded as both desirable and important … The concepts of representation and responsibility are indeed, invoked in almost every modern discussion of how countries ought to be governed.

The analysis offered by Birch also tends to emphasise continuity over change: 'fresh theories have not replaced the old, but have tended to take place alongside old ones as strands in the British Political Tradition'

(Birch 1964: 227). In emphasising the virtue of the BPT and its path dependent, contiguous nature, the underlying conservative understanding of tradition in Birch's writing on the BPT is evident. The undertheorisation of tradition that is a weakness of conservative political philosophy also creates problems for Birch's analysis. One such problem is that Birch's account is largely intuitive and thus fails to analyse the relations between the BPT, as a set of ideas regarding representation and responsibility, the institutions and practices of British politics and the actors operating within them. As such, Birch fails to analyse how the BPT is subject to change. Although a relationship between the theories of representation and responsibility and contemporary circumstances is implicit in Birch's analysis, he does not develop this idea further by exploring a dynamic understanding of the material and the ideational. As a result, the values of the BPT are seen as 'natural consequences', which are 'so generally accepted and ingrained that they have not been formulated into theories or doctrines' (Birch 1964: 241). In a similar fashion to Birch, Beer explores how the dominant theories of representation and responsibility became embedded in the wider political culture of the UK.

Beer: Political Culture

Beer (1965) offers a high influential account of the BPT, which shares similarities as well as differences with Birch (1964). Like Birch, he employs theories of representation, and less directly of responsibility, as his organising perspective. In doing so, he also emphasises the role of ideas for understanding current political institutions and practice (Tant 1993: 5; Hall 2011: 9). However, unlike Birch, Beer locates theories of political representation in the broader debate on the construction of authority and the role of government in the British polity. At the centre of Beer's analysis is the variable of political culture, which he defines as 'a distinctive system of political ideas' (Beer 1965: 390).

In a marked departure from the work by Birch, Beer explicitly defines the BPT as 'political culture' or 'as a body of beliefs widely shared in society' (Beer 1965: x–xi). For Beer (1965: xii), political culture 'is one of the main variables in a political system, and a major factor in explaining the political behaviour of individuals, groups and parties'. As such, Beer's conception of the BPT can be characterised as 'a thesis of democracy' through which to understand the narrow elitist view of democracy that permeates the British polity. This broader analytical scope is a key feature

of Beer's work. By conceptualising the BPT as political culture, Beer is able to claim that the values and ideas of the BPT imbued the collective public consciousness as well as the political elite, who tacitly accept the alleged benefits of strong and decisive government. This conception of the BPT creates the opportunity to analyse how the dominant tradition has been inculcated and reinforced over time, by highlighting 'the continuities in British political culture that are fundamental to an understanding of contemporary British politics' (Beer 1965: x). However, indicative of the underlying conservative notion of tradition, Beer tends to reiterate the positives of the BPT rather than analysing the theoretical basis for its continuity.

Writing in the 1960s, Beer's perspective was undoubtedly shaped by the existence, real or perceived, of a deferential political culture. During the post-war period, the British political system was seen to enjoy widespread acquiescence and the ideals that underpinned it went relatively unquestioned: 'The system of club government could not have originated, or survived, without the support of a wider culture of deference' (Moran 2003: 34). As Norton (1989: 10) puts it the British constitution 'was rarely discussed, other than occasionally for the purpose of praise' (Norton 2010: 432). Kenny (2014: 19) alludes to the inherent conservatism of English society and nationhood, which is pervaded 'by a consciousness of a people who dream only of living in an old country, and are incapable of fostering a kind of inclusive modern nationality that would enable them to deal with the realities of the present'. Given the Westminster centric nature of the political system the political culture of the UK has been decisively shaped by an English political identity, to the extent that they were treated as synonymous (see quote from Beer in the next passage). In a post-devolution context the tensions in the territorial settlement of the UK between different political traditions have become more evident (see Hall, 2011).

Although Beer's work offers greater insight into the continuity of the BPT, the conservative notion of tradition that underpins his analysis leads to an underexploration of the relations between change and continuity and the ideational and the material. Akin to Birch, the theory and practice of British politics are perceived as 'natural' and as having a largely benign effect: 'In the sphere of politics, the Englishman's faculty for not being too clear about the theories on which he is acting has had, on the whole, only happy results' (Beer 1957: 645). Reflecting its conservative underpinnings, the BPT is also viewed as distinct from ideology: the Labour

Party is said to have been able to alternate between different theories of representation more easily than 'the more doctrinaire socialists of the Continent' (ibid.). The implication is that British politicians, even those on the left, are guided by an inherent, natural pragmatism rather than dogmatic, ideological or rational principles. For Beer, there is a general acceptance by both Tory and democratic socialists, despite their conflicting ideas of parliamentary democracy, of the legal and constitutional framework of the UK and the merits of strong government (Beer 1965, Diamond 2013). The accommodation of diverging ideological positions within the basic parameters of the BPT is a key theme of W.H. Greenleaf's work, which is outlined below.

Greenleaf: Libertarianism and Collectivism

Greenleaf (1983a, b, 1987), writing from a different but in many ways compatible perspective to Birch and Beer on the BPT, stressed the role that contrasting ideas and values play in affecting both institutions and outcomes. From an idealist perspective, Greenleaf argues that the character of modern British politics has been shaped by the interaction of two competing ideas: libertarianism and collectivism (McAnulla 2006: 19). Greenleaf's framework is based on Hegel's dialectical logic: 'a given proposition necessarily contains within it, its opposite' (Kisby 2007: 77). In contrast to Birch and Beer, Greenleaf is concerned with how these different ideologies have shaped the development of political institutions in the UK.

Although the influence of conservative political thought is again evident, Greenleaf's analysis differs from Oakeshott's understanding of the BPT as non-ideological. Instead, Greenleaf argues that the BPT is characterised by a trans-ideological tension between libertarianism and collectivism. Greenleaf claims that societies, like individuals, 'are not to be described by reference to nuclear attributes' but rather 'contain multitudes, even contradictions' (1983a: 11–12). Thus, the major theme of Greenleaf's work was that the 'character' of modern British politics is reflected in the continuing tensions between libertarian and collectivist tendencies, rather than simply a transition from libertarianism to collectivism (Tant 1993: 96). The antithesis between libertarianism and collectivism was based on 'contrasting views of freedom, personal fulfilment, and the proper place of government in society' (Greenleaf 1983b: 19–20). For Greenleaf, libertarianism meant four things:

- A stress on the rights of the individual and freedom from both social supervision and 'arbitrary political control';
- a limited role for government;
- the diffusion of power and authority; and
- a commitment to uphold the rule of law.
  (Greenleaf 1983a: 15–17)

The primary emphasis on the right of the individual to the 'inalienable title to a free realm of self-regarding action' in libertarianism leads to an advocacy of minimal government (or one focused on the protection of individual rights), a pluralistic distribution of power and legal protection from the arbitrary power of constraint (Greenleaf 1983a: 15–19). Conversely, collectivism was concerned with:

- a responsibility to promote 'the public good';
- the principles of equality and social justice;
- the creation of a 'positive state' able to intervene in the pursuit of these goals; and
- the concentration of state power.
  (Greenleaf 1983a: 20–23)

The common good, as opposed to the rights of the individual, is seen as 'morally superior' in collectivism (Greenleaf 1983a: 20–21). It is the pursuit of social justice and the public interest, 'which does not exist naturally' (Greenleaf 1983a: 22), that justifies the power and intervention of the state.

In constructing a dialectical framework between the ideal types of libertarianism and collectivism, Greenleaf evokes an iterative relationship between the ideational and the material, emphasising that 'these concepts are not mere abstractions or figments: they emerge from, or rather are immanent in, the concrete historical reality itself and the contrast they represent has permeated, indeed constitutes, the entire course of British politics in modern times' (1983a: 15). Political institutions, thus, 'exhibit the compromise made by these contending moral forces at the signing of their last truce' (Greenleaf 1983a: 15). However, to argue that societies and political systems are comprised of 'complex, diffuse… Even contrarious' elements, is not to say that 'its nature cannot be grasped' (Greenleaf 1983a: 11). For Greenleaf (ibid.), the character of British politics is coherent (which admits diversity) rather than uniform (which precludes it):

> We must acknowledge that to describe or understand character it is necessary to get clear not the quality that is presumed to feature in very action but rather the habitual—and more or less varied and incompatible—inclinations that indicate the extremes of conduct of which an individual is capable and to which he is urged alike by an undecided will, a tangled heredity, and a changing and perhaps confusing environment. To act in character is to act not in the same or in a constant way but to move within certain limits and the task of characterization involves, first, the establishment of these confining tendencies and then the observation of their diverse fusion throughout the entire range of specific aspects of thought and action.

In addition to examining the relationship between ideas and institutions, Greenleaf therefore also offers a more developed conception of tradition, arguing that the notion of the BPT is useful because it conveys, 'unity in diversity: a complex amalgam of different forces and opposing choices, and therefore of internal tensions which is at the same time in a continual state of flux and development but which nevertheless constitutes a recognizable and acknowledged whole' (1983a: 13). For Greenleaf, libertarianism and collectivism, as the two strands of the BPT, are not immiscible elements; instead they are seen to constitute the two essential parts of a fluctuating dialectical relationship, in which the subordinate doctrine acts as a constraint on the contemporary dominant paradigm. Thus, although Greenleaf's account suggests that there has been a shift from the late nineteenth century from libertarianism towards collectivism as the extent of government intervention increased in response to the consequences of industrialisation, urbanisation and total war, at no point does one ever entirely eclipse the other. The beliefs and doctrines attached to libertarianism and collectivism have circumscribed the boundaries of political debate at different times. Political discourse in Britain, claims Greenleaf, has been decisively shaped by the recurring tension between the demands for individual liberty and greater government intervention (1983b: xi). Even at the height of liberalism in the 1840s the state was never completely detached from social and economic affairs. The role of the state, for example, was central to the early development of public utilities in Britain in the mid- to late nineteenth century. Conversely, in the late 1960s and early 1970s, when the British state was at its most expansive, in terms of its size and number of functions, it only ever employed 30 % of the total workforce in a predominantly private economy (Richards and Smith 2002: 51).

At the core of Greenleaf's thesis is the argument that the dialectical tension between libertarianism and collectivism has shaped the institutions

and practices of British government. Greenleaf emphasises the relationship between the ideational and the material by claiming that the BPT is not merely a set of ideas about democracy but is in fact inscribed, or 'hard-wired' (Diamond 2013: 29), into the practices and institutions of British politics. The narrative provided by Greenleaf stresses that the intellectual ascendancy of collectivism led to the development of new institutions and mechanisms through which the state intervenes in the social and economic activity of citizens. The third volume in Greenleaf's study, 'A Much Governed Nation' (1987), is focused on the growth of state intervention in the twentieth century and the triumph of collectivism over libertarianism. In this volume, Greenleaf offers a normative perspective on the modern British polity, which he asserts is characterised by 'a continuing parade of institutional modification and invention and a tendency to apply this machinery ever more widely' (Greenleaf 1987: 3). Greenleaf (1983a: 42) seeks to answer the question:

> Why, in Britain, has a libertarian, individualist society sustaining a limited conception of government been in so many ways and to such a degree replaced by the positive state pursuing explicit policies of widespread intervention in the name of social justice and the public good?

Reiterating Oakeshott, Greenleaf claims that traditions are useful in that they provide unambiguous answers to problems; for Greenleaf the BPT imparted that state growth and increased intervention should be opposed (Bevir and Rhodes 2007: 246).

It is important to note that the two theoretical positions presented by Greenleaf are ideal types. Greenleaf (1983a: 23–24) makes clear that in reality there is an array of intermediate positions with varying responses to the question: what should be the role of government? The dialectic of libertarianism–collectivism can thus be used to pull together and place in a common framework the diverse practices and ideas of British political life, which have developed over the past century or so, in order to establish its fundamental character or identity (Greenleaf 1983a: 14). In line with Beer, Greenleaf posits that the BPT has been able to accommodate the shift from libertarianism to collectivism in the twentieth century and the expansion of the state in that transition. As such, Greenleaf maintains the overall continuity of the UK state, where the different ideas of collectivism and libertarianism have been absorbed into the same governing philosophy of the BPT and Labour and Conservative administrations have

reaffirmed their commitment to an elitist model of statecraft that emphasises centralising, top-down government (Diamond 2013).

The work by Greenleaf offers a substantial contribution to the debate on the BPT. Of particular value is his analysis of how the ideas of the BPT have shaped the institutions and practices of British politics. Implicit in the analysis is the view that there is an iterative relationship between the ideational and the material. The major criticism of Greenleaf is that he reifies traditions and neglects the dimensions of agency which political actors can exercise in relation to the traditions they inherit: selecting elements within them and combining ideas from different traditions (Kenny 1999: 299). As such, Bevir and Rhodes (2003) have argued that Greenleaf provides an ahistorical account, which focuses on continuity and neglects change. They also argue that Greenleaf oversimplifies the relationship between ideas and institutions by implying that traditions of thought translate directly into policy and political action (Bevir and Rhodes 2003: 23).

Although one should be careful not to homogenise the scholarship of the classical wave, the work of Birch, Beer and Greenleaf can be viewed as rooted in the prevailing approach of 'The British School' that emerged in the late nineteenth and early twentieth centuries (see Gamble 1990; Kavanagh 2003). All three subscribe to the idealist tradition and a Whiggish interpretation of history: 'Studying the relationship between, on the one hand, political ideas and, on the other, the events and actions of politicians in the past would, it was claimed, provide practical knowledge and wisdom for future political leaders' (Kavanagh 2003: 103). In doing so, they postulate a thematic continuity in the ideas and institutions that underpin the British polity and privilege a gradualist view of change. As a result, the classical literature has been criticised for offering an idealist perspective that places too much explanatory weight in the power of ideas to the detriment of other factors, such as interests, structure and agency.

The classical authors are also too attached to the idea of continuity in British political development and as a result offer an impoverished conception of change. The classical literature on the BPT is afflicted by a tendency to present an overly synchronic view of politics that privileges continuity over change. Kerr and Kettell (2006: 19), for example, criticise the classical literature for perpetuating the 'notion of a relatively static and incremental, unilinear tradition', which portrays a historicist and teleological perspective of British politics that has remained unchanged over time. In this sense, political outcomes in the accounts provided by Birch, Beer and

Greenleaf tend to be viewed as inevitable. The BPT is thereby naturalised, without adequate analysis of interests and narratives that underpin it.

The absence of critical theorisation in the classical literature is derived from the conservative notion of tradition on which it is based. This leads Birch, Beer and Greenleaf to be sanguine about the effect of the BPT on political outcomes. Consequently, implicit in the work of all three authors is the view that tradition is a beneficial force in British politics that has served both the political elite and the populace well. For example, Birch (1964: 244) endorses Lord Hailsham's view that 'the British on the whole prefer to see a strong government of which they disapprove, rather than a weak government whose political structure is more complex and whose power to govern is limited'. The British political system, moreover, is conceived as exceptional in comparative terms and considered to be following a distinctive, and allegedly superior, developmental trajectory. The classical literature perpetuates some of the fallacies of the conservative view and serves as an apologia for the structured inequalities within British society.

Therefore, while influential, the classical understandings of the BPT offered by Birch, Beer and Greenleaf have been criticised for lack of conceptual clarity and recognition of their own normative foundations. In response, a number of critical realist scholars have claimed that continuity in the context of the dominant BPT should be problematised rather than naturalised. It is to this critical wave that we now turn.

The Critical Wave

The weaknesses of the classical approach to the BPT prompted a number of theorists of British politics to further develop the insights of Birch, Beer and Greenleaf, both theoretically and empirically. These more critical authors—such as Marsh, Tant and Evans—subscribe to the classical view of the BPT as a top-down narrative of democracy which draws upon a liberal notion of representation and a conservative notion of responsibility. They also, following Greenleaf, seek to link these ideas to the material conditions of British politics: strong government capable of taking unpopular decisions. Crucially, however, the critical literature introduces a more developed theory of contestation and explores how the ideas and practices of the BPT have been able to resist the challenge of alternative perspectives (McAnulla 2007). Therefore, rather than 'naturalising' the top-down 'power-hoarding' nature of BPT, the critical literature seeks to problematise its continuity.

Marsh and Tant: An Elitist Conception of Democracy

Marsh conceives the BPT as an elitist narrative of democracy. He argues that British politics is pervaded by a top-down version of democracy that stresses the need for strong, efficient, and centralised rather than responsive government. Employing the organising concepts of representative and responsible government, Marsh deduces from Birch and Beer that 'the modern British political system is in fact underpinned by a conservative view of responsibility which can be traced back to old Tory views together with a limited liberal view of representation'. However, although Marsh—along with Tant (1989)—utilises the same analytical language as the classical literature, his account offers some significant departures from the earlier understandings of the BPT. Firstly, Marsh and Tant (1989) emphasise the continuity of ideas and coherence of outcomes much more than either Birch or Beer. They observe that 'virtually all writers on the BPT note the extent to which continuity rather than radical change marks succeeding dominant ideologies' (Marsh and Tant 1989: 6). They argue that the Old Tory and Whig views continue to have resonance in British politics, borne out by the continued opposition to popular sovereignty and the stress put on 'order and stability' (1980: 3). Marsh and Tant contend that the advent of the Old Tory and Whig ideas shaped the terms of the debate on the liberal theory of government decisively; the parameters of debate have effectively safeguarded the maintenance of the majoritarian electoral system, which in turn has served to propagate strong government (1989: 9). The debate on responsibility has been constructed to reflect the notion that the government is 'the arbiter or judge of the national interest' (Marsh and Tant 1989: 12). As such, Marsh and Tant contend that despite the onset of electoral democracy, following the full extension of the franchise in 1928 and the emergence of the Labour Party, the ancient institutions of the British state remained largely untouched in the twentieth century; none of the reforms promised meaningful democratisation or decentralisation of decision-making. They argue that the influential ideas of Beveridge, Keynes and the Fabians, which shaped the social democratic consensus in the post-war period, 'were paternalistic … believing in the rule of expertise' (Marsh and Tant 1989: 6). At the core of these ideas was elitism: the inevitability of a top-down government and the efficacy of allowing the elites to run the state. The BPT, for Marsh and Tant, is based upon a conservative view of change: 'there is a strong belief in realizing pragmatic change within existing state institutions' (Johnston 1999: 165).

Building upon Greenleaf, Marsh and Tant argue that the narrow elitist conception of democracy underpins the institutions and processes of British government, which, in turn, shapes the contours of political and constitutional debate. In arguing that the elitist conception of democracy has shaped the development of institutional arrangements, Marsh and Tant implicitly posit the existence of dialectical relationship between the ideational and the material. However, while Marsh and Tant provide a fundamental departure from the classical literature they do not explicitly address the meta-theoretical issues that were absent in the earlier accounts of the BPT. In particular, the failure to address concepts of continuity and change makes Marsh and Tant susceptible to the accusation that they offer a static conception of British politics.

In addition to the elitist conception of democracy and the emphasis on the interplay between ideas and institutions, the major contribution of Marsh and Tant is the critical approach they adopt in relation to the BPT. In contrast to the conservative underpinnings of the classical literature, Marsh and Tant question whose interests are served by the BPT and the institutions and processes it shapes. Marsh argues that the ideas which underpin the debate about representation and responsibility are the same as those which underpin economic organisation and the relationship between the state and the economy. For example, Marsh argues that the adoption of Keynesianism as means of economic management is unsurprising, as the dual emphasis on market freedom and state direction in Keynesianism embodied the values of individual liberty and strong Government that are at the core of the BPT. In this sense, the dominant economic as well as political elite are seen to use the BPT as a rhetorical device to justify the power they possess: political and economic freedom was ensured by a government who 'knew best' and checked by a limited form of representation, via periodic free and fair elections.

Tant: The Triumph of Elitism

Tant (1993) develops the critical approach offered by Marsh and Tant (1989) from a radical (bottom-up) perspective. For Tant, the conception of representation and responsibility in British politics are inherently elitist. In terms of representation, Tant claims that the majoritarian electoral system ensures that once the executive is in power, it can invariably force through its legislative agenda, with only limited accountability to the electorate (1993: 113). In this 'tradition of strong, centralised, independent and initiatory

government' (Tant 1993: 6), popular participation in the political process is extremely limited beyond periodic elections. This 'thin' conception of accountability is weakened further by the notion of 'trusteeship', which means MPs are under no constitutional obligation to respond to the views of their constituents once elected (Tant 1993: 110). Underlying this limited form of representation is the notion of responsibility, which maintains that while influence over the decision-making is limited to a relatively small number of people, this elite takes decision that are in the national interest (Tant 1993: 5). The emphasis on strong government demands that:

> the people's representatives … have a large amount of discretion and autonomy in decision making on behalf of the people and in their ultimate interests … In this view government is a specialised vocation; government must therefore be unfettered, free and independent, in order to make sometimes difficult decisions in the national interest. (Tant 1993: 44)

Tant (1993: 6) criticises the classical view of the BPT for adopting a 'top-down' perspective that regards the liberal notion of representation and the conservative notion of responsibility as both natural and inevitable aspects of British politics. Such an approach, claims Tant, fails to analyse what does not 'fit' with the prevailing political culture *and why* (Tant 1993: 88). As a result, there has been a tendency when dealing with the BPT to 'read' events backwards through the known outcomes (1993: 89). The work by the Birch and Beer on the BPT can be seen to engage in teleological fallacy because it 'ignores periods or events that do not fit with the framework of stability and continuity, or dismiss them as 'short lived forms of "new politics" [such as Radicalism in the nineteenth century] that were simply inferior' (Tant 1993: 88). Hence, what Tant terms the negative or inhibitive role for political culture is neglected.

In response, Tant advocates a radical democratic perspective, which problematizes the BPT by examining its 'capacity for self-perpetuation and self-defence against challenges from a contrary, participatory direction' (1993a: 1). He highlights the resistance of the ideas and practices of the BPT to three competing (participatory) conceptions of democracy: nineteenth-century Radicalism; the syndicalist and guild socialism of the Labour Party in the early twentieth century; and the Campaign for Freedom of Information from the mid-1970s. For Tant, the fact that new contrary trends did not endure is something that analysis needs to account for. Without such explication, the 'inhibitive role' of institutionalised

political culture in contending 'hostile' visions of democracy is obscured (ibid.). For Tant, in Britain: 'the context within which that competition occurs is both limited ("narrow") and biased ("elitist"), [so that] some ideas and conventions are favoured and some inhibited by the existence of prevailing political culture' (Tant 1993: 89). Rather than outcomes being the result of a natural and inevitable evolution of continuities in ideas, values and attitudes, Tant alludes to a dialectical relationship between the dominant political tradition and 'threats' to current practice:

> The greater the divergency from current practice represented by a proposed reform the less likely it is to be adopted. .. Fundamental change must therefore be attempted through overthrow of the system itself or within this, at best, incremental context. (Tant 1993: 91)

For Tant (1993: 3), any proposed policy or reform that is underpinned by ideas and values at odds with 'representational and governmental theories underpinning the traditional operation of British government is thereby inhibited at best'. Tant claims that any proposed new idea which conflicts fundamentally with the predominant BPT must either supersede it as the existing theory and practice, and in doing so create a new, appropriate, institutional framework or be itself defeated. For Tant, however, 'such a defeat is not necessarily either total or an immediate consequence of the challenge' (ibid.). Often it is accomplished through a subtle and protracted process of assimilation. Nevertheless, such a process of 'constitutionalization' does see the challenge effectively disarmed (Tant 1993: 3). In the case of the Labour Party, Tant argues that the participatory approach to government devised while in opposition (in which members would participate in policy debates and agree on future programmes of policies) was abandoned upon gaining office when Labour governments often implemented policies at odds with the party membership. While the Party leadership offered a more participatory view of democracy in opposition, in power it believed it had to be 'independent' and 'responsible', making decisions based upon their own judgement as to the nation's best interests (Tant 1993: 191). The Labour Party, therefore, became 'thoroughly constitutionalized; from initially representing a threat to the British Constitution it has come to be one of its major guarantors' (ibid.). Moreover, in surveying the impact of collectivism Tant distinguishes between the content (of policy) and the 'form' of the institutional context in which it developed (Tant 1993: 108). Therefore, while the content of collectivism rested on

a positive, interventionist role for the state, it remained within the parameters of the established governmental framework premised on the ideals of nineteenth-century individualism (Diamond 2013). As Tant (1993: 95–96) states:

> [although] what governments did, changed very significantly from the kinds of policies favoured in the earlier period, this is less significant than may be thought because the nature of government changed little. That is, in regard to the institutions and processes of government, there were remarkably few innovations to facilitate the Collectivist orientation of post 1945. Indeed all that really changed was what governments considered to be in 'the national interest' changed radically, whilst the government's role as arbiter of the national interest (as a concept) changed hardly at all.

Tant also argues that predilection in the BPT for strong, responsible government that is 'unfettered, free and independent' (Tant 1993: 44) has tended to produce one of the most secretive liberal democratic states in the modern era (Harden and Lewis 1988: 267). Resting on the notion that government is the sole arbiter of the national interest, the BPT encourages a style of government that is closed and secretive with no presumption of access for the general public (Hall 2011). The theme of secrecy is developed further in Vincent's research on the British state.

Vincent: The Culture of Secrecy

Given that, according to the BPT, government is deemed to be the only legitimate arbiter of the national interest, openness to other societal interests or in fact the will of the majority is construed as weakness, and even irresponsible. Vincent's (1998) comprehensive account of the British state demonstrates how its development has been mediated by a culture of secrecy, or as Richard Crossman (1971) pejoratively puts it, 'the real English disease'. Not only is the history of the British state seen to reflect an obsession with official secrecy, it is also characterised as perpetuating a 'silence about secrecy' (Vincent 1998: 314). British politicians and officials have followed Henry Taylor's (Henry Taylor 1836) maxim that 'A secret may be best kept by keeping the secret of it being secret.' This culture is seen to be so pervasive in Whitehall that secrecy gradually became an end in itself: 'secrecy for secrecy's sake, with little regard for whether a legitimate need to protect information really exists' (Moran 2012: 13).

Vincent sees this secrecy of the British state as distinctly cultural. In the mid-nineteenth century, the lack of a statutory definition of privacy or of the general right to official information meant that all that prevented the abuse of information by the state was 'a particular British construct of gentlemanly liberalism' (Vincent 1998: 318). This was a set of values and instincts that stressed moral self-restraint, 'which lay at the heart of both the identity of the gentleman and his claim to authority and respect' (Vincent 1998: 40). For Wills (1890: 44 cited in Vincent 1998: 42): 'The essence, then, of a gentleman is unselfishness, and the laws by which a gentleman is governed are laws of honour. Honour implies perfect courage, honesty, truth and good faith.' Vincent argues that a notion of 'honourable secrecy', grounded in the social, hierarchical and class characteristics of mid-nineteenth-century Britain, was inculcated in the emerging administrative culture of Whitehall: 'British secrecy was not to be confused with continental despotism, because in the end it was in the hands of men of honour' (1998: 50).

The inculcation of this ethical code of 'instinctive self-censorship' was sufficient to 'render unnecessary the overt use of formal regulations' (Vincent 1998, 28–29). Initially, the code was used as a bulwark against the calls for an Official Secrets Act; the introduction of legislation in 1889, and the revisions that followed, moreover, was designed not to defend the public from the government but the government from its own civil servants in the burgeoning and more heterogeneous public bureaucracy, 'who were beyond the influence of this code of gentlemanly restraint' (Vincent 1998: 319). In spite of this codification, the 'culture of secrecy' remained implicit as an ethos espousing 'discreet reserve' and the 'negation of personal interest', and continued to shape the outlook of Britain's political class (Vincent 1998: 315; Richards and Mathers 2010).

While the habit of secrecy has deep roots in British political administration, inherited from its relatively peaceful transition from absolute monarchy to an executive dominated parliamentary system under the principle of the Crown-in-Parliament, it is only in the late nineteenth century when the 'spectre' of mass democracy threatens the power of the governing elite that official secrecy is enshrined in legislation (Christoph 1975). In this era of democratisation, characterised by the growth of the state and a more active and critical role for the free press, official information began to be leaked outside of the 'club'.[1] The institutionalisation of official secrecy was not a formality, however. In this proto-democratic age, the governing elite consciously constructed a legitimising mythology for

the perpetuation and indeed deepening of secrecy in the institutions and organisational mentality of the British state and its officials (Moran 2012). Although much of this centred on national security and the public's fear of war and foreign spies, it also cultivated a definition of *good* government as *closed* government (Ponting 1990, my emphasis). Conversely, open government was portrayed as inefficient, costly and damaging to the day-to-day functioning of ministers and officials (Rowat 1979). Lord Croham, a former head of the Civil Service, illustrates the British interpretation of open government, stating that:

> The increases in the powers and in the resulting accumulation of new kinds of information in the possession of the British government tended to reinforce the propensity to secrecy which is inherent in all Government and had been substantially reinforced by war. Most of the highly difficult tasks assumed by government would have been made much more difficult by advance knowledge of the Government's intentions or of detailed instructions given to its negotiators and controllers. (Croham, Would Greater Openness Improve or Weaken Government: 3 cited in Croham 2011: 317)

Official secrecy legislation was buttressed by the central principle of civil service anonymity, counter-balanced by a putative public service ethos, which gave officials an instrumental incentive to withhold information. The capacity of the BPT for self-perpetuation in the face of increasing internal and external challenges in the contemporary era is a theme that has occupied the more recent work by critical authors, such as Evans (1995, 2003) and Hall (2011).

Evans and Hall: The Constitutional Conservatism of the BPT

Following Tant, Evans (1995, 2003) and Hall (2011) seek to relate the BPT to the debates about constitutional reform since the 1970s. In this context, Evans studies the rise of Charter 88, whose aim of fundamental constitutional reform is characterised as a participatory challenge to the elitist conception of democracy contained within the BPT. Evans argues that the BPT has mollified Charter 88's ability to radically counter the dominant elitist view. However, Evans is optimistic about the prospects of change, and states Charter 88 must 'maintain the radicalism of its demand … Only in this struggle can it forge the breakthrough from how we are governed, to how we may govern ourselves' (Evans 1995: 270). His later work on the constitutional reform agenda of New Labour (Evans 2003)

again recognises the potential for change in the BPT by highlighting the intended and unintended consequences of constitutional change. Evans, therefore, forwards a nuanced conception of change and continuity, which attaches importance to the role of agency and contingency in creating opportunities for change to the dominant paradigm. Evans' account suggests that the BPT privileges a path dependency rather than path determinism, 'where actors have the capacity to reshape the dominant tradition, but face the prospect of sustained opposition to any concerted challenges' (Diamond 2013: 36).

Conceiving the BPT according to a more sophisticated understanding of change and continuity, which recognises the role of contingency and unintended consequences, creates a conceptual space for agency. Crucially, it is essential to acknowledge that the BPT creates opportunities for individual actors and particular ideas, as well as acting as a structural constraint. Hall (2011) develops this notion of the BPT as operating on an asymmetric ideational terrain. Building on the work of Marsh et al. (2003) on how power and resources are asymmetrically distributed in the British polity, Hall argues that traditions (as bodies of beliefs and discourses) also resonate asymmetrically. The ideational terrain of British politics, in other words, favours ideas and traditions that correspond to the norms and values of the BPT. Actors who forward ideas from competing participatory and inclusive visions of democracy are therefore likely to be frustrated in their efforts. Hall (2011) illuminates this discussion of the asymmetric resonance of traditions with reference to expressions of the 'nationalist tradition' in Scotland, Wales and Northern Ireland. In rejecting the concept of a unitary state, executive dominance and the centralisation of power in Westminster, in favour of self-determination and multiple national identities, the nationalist tradition represents a direct challenge to the core tenets of the BPT. The iterative exchange between the nationalist tradition and the BPT constitutes one example of the ideational conflict that forms the backdrop to the contemporary British political system. Hall (2011) shows how that contestation can and does lead to change, albeit in a political landscape that privileges continuity due to the way in which the BPT resonates more fully than other competing conceptions of democracy.

The works of Marsh, Tant, Vincent, Evans and Hall have provided a significant contribution to the literature on the BPT. Moving beyond the 'naturalised' perspectives of the BPT offered by the classical literature, these authors have highlighted both the fundamentally elitist conception of democracy underlying British politics and the existence of competing

traditions in British politics, which have periodically challenged the dominant tradition (Marsh and Hall 2007). The critical literature stresses that the dominant tradition has been resistant, but not immune, to challenges from radical or participatory perspectives (McAnulla 2007: 5). Emphasis is therefore placed on the continuity of British political institutions and practices. As a result, some (see Bevir and Rhodes 2003) have claimed that the critical literature on the BPT overplays the extent of continuity and neglects the evidence that ideas and traditions do change. From an interpretivist perspective, Bevir and Rhodes argue that it is essential to consider the different, contending traditions in British politics and trace their development and influence over time.

Bevir and Rhodes: an interpretive critique

At the core of new interpretivism is the primacy of agency. Although they do not claim that individuals are fully autonomous agents, Bevir and Rhodes claim that '[i]ndividuals can reason creatively in ways that are not fixed, nor even strictly limited by, the social contexts or discourse in which they exist' (2003: 32). In this agency-centric perspective, therefore, although individuals act against a 'backdrop' of tradition, they can form beliefs that are independent of any given tradition, or may choose to redefine a particular tradition in response to new ideas (McAnulla 2006: 116).

The non-essentialist approach of Bevir and Rhodes leads them to suggest that there are multiple traditions at work within British politics rather than one dominant BPT. They identify four traditions and use them to narrate the changes to the British state associated with Thatcherism and supposed shift from government to governance: the Tory, Liberal, Whig and Socialist traditions (2003, 2006). As such, they argue that the notion of a single BPT is misleading, although Rhodes (2011: 281) does concede that ministers and officials remained wedded to the belief that 'earlier constitutional beliefs and practices are reliable guides to present-day behaviour'. Rather we should recognise the existence and impact of multiple political traditions, which are grafted onto existing institutional ideas and values in a contradictory and imprecise fashion (Rhodes 2011). Traditions, in the interpretative approach therefore, are contingent and rooted in the reflexive actions of individuals. They attempt to narrate developments and changes in British politics, such as Thatcherism and network governance, through the interplay of competing traditions.

The work of Bevir and Rhodes offers a number of contributions to the study of tradition in British politics. In particular, they highlight the role of ideational factors in explaining outcomes, which have often been neglected by political science in Britain (Hay 2004). Also, they underline the importance of competing traditions in explaining change. As Marsh and Hall (2007: 227) argue, 'Bevir and Rhodes are right that a continual process of contestation forms the backdrop against which British politics is conducted and helps shape and inform future choices.' However, despite its contribution to the debate on tradition, the interpretive approach offered by Bevir and Rhodes has been subject to a number of criticisms. The underlying post-foundationalist approach of Bevir and Rhodes leads them to privilege agency and undervalue the role of structure, and in particular the notion that traditions can act as structure in the way they constrain or limit beliefs of agents and the opportunities available to them. Consequently, they overstate the ease with which individuals can exert control over their inherited context. Critics of Bevir and Rhodes (see Frohnen 2001; McAnulla 2006; Marsh and Hall 2007) argue that traditions are not as malleable as they imply. Rather, traditions are 'sticky' social realities that have intellectual and practical habits (Frohnen 2001: 109).

The critical approach, moreover, does not preclude fundamental change nor, ultimately, a complete rupture with the BPT. To argue that the BPT has resisted challenges to it so far is not to argue that it will do so in perpetuity. What the critical approach does argue is that such fundamental change or rupture is difficult relative to the 'divergency from current practice' (Tant 1993: 91). Rhodes' recent concession that 'Much has changed, but much remains' (Rhodes 2011: 281) in terms of the traditions that shape 'everyday life' in the British state suggests the BPT continues to play key role and has not been usurped by the rise of managerialism and network governance. Also, whilst a challenge to the dominant political tradition may appear to have failed in the short-term, it may open up the possibility for further challenges in the future (Hall 2011: 41). Hence, change, continuity and discontinuity in the BPT are open-ended. It is crucial therefore to empirically examine each challenge to the dominant political tradition and its outcomes.

Analysing the role of traditions as constraints on and forces for state transformation is dependent upon one's conception of change and continuity. Hay defines change as 'a contrast between states or moments of a common system, institution, relationship or entity—a difference between the structuring of relations then and the structuring of relations now'

(Hay 2002: 4). Through invoking 'change in or of … a common point or system of reference', Hay posits that 'to speak of change is to imply some measure of continuity' (ibid.). Complete termination of a system and replacement with another represents substitution rather than change per se: 'To identify change over a given time frame is then, strangely perhaps, to make the simultaneous claim that the system exhibits some degree of continuity over this time frame' (ibid.). We should resist the temptation to conflate change with discontinuity. The identification of change or stability should be made distinct from issues of continuity and discontinuity that are concerned with the modalities or different temporalities of an identified change (Hay 2002: 3–4). In this sense, the aim of this book is not to find out whether there has been any change to the British regulatory state. That is assumed. Rather, the objective is to analyse the temporal characteristics of the changes and their contiguous or discontinuous nature (Hay 2002: 4). Continuity implies that whatever change occurs is incremental, iterative, cumulative and unidirectional following a gradual and evolutionary process. In contrast, discontinuity suggests an uneven conception of political time, which is punctured by ruptures and strategic moments that alter the trajectory of events.

Conclusion

The literature on the BPT is diverse, in methodological, conceptual and normative terms. Despite the differences, three core themes emerge from the debate. Firstly, common to all understandings of the BPT is a conceptualisation of the mode of governing as elitist and top-down. Marquand characterises the governing practices of Britain during nineteenth and twentieth centuries as a club: 'The atmosphere of British government was that of a club, whose members trusted each other to observe the spirit of the club rules; the notion that the principles underlying the rules should be clearly defined and publicly proclaimed was profoundly alien' (Marquand 1988: 178). The operations of 'club government' are oligarchic, informal and small. Such governing practice is underpinned by (pre-democratic) elitist concepts of representation and responsibility. Secondly, the culture of 'club government' is pervasive: although the apogee of club government is Westminster and Whitehall, the BPT also inculcated wider systems of governance (such as self-regulation) and the general populace. Thirdly, the institutions and ideology of club government, as products of the Victorian era, are anachronistic and have been increasingly challenged

and contested since the onset of formal democracy in 1918. This book is primarily concerned with these three features of the BPT: the elitist conception of power and statecraft; the impact of the political culture on other areas of governance and civil society; and the persistence of the dominant tradition in the face of increasing challenges. Relating to these three core themes of the BPT, the following chapter examines how the elitist conception of democracy in British politics has influenced the development of regulation in the UK.

Note

1. See Ponting (1990: 2) for a discussion of 'leaks' by officials in the late nineteenth century.

Bibliography

Beer, S. H. (1957). The Representation of Interests in British Government: Historical Background. *American Political Science Review, 51*(03), 613–650.

Beer, S. (1965). *Modem British politics: A study of parties and pressure groups*. London: Faber & Faber.

Bevir, M., & Rhodes, R. A. W. (2003). *Interpreting British governance*. Psychology Press.

Bevir, M. and Rhodes, R. (2006). Interpretive Approaches to British Government and Politics, *British Politics, 1* (1): 84–112.

Bevir, M., & Rhodes, R. (2007). Traditions of political science in contemporary Britain. Adcock, R., Bevir, M. and Stimson, S.C. *Modern political science: Anglo-American exchanges since* 1880. Princeton, NJ: Princeton University Press.

Birch, A. H. (1964). *Representative and responsible government: An essay on the British constitution*. University of Toronto Press.

Birch, A. (1979). Representation. London: Macmillan.

Blauvelt, M. T. (1902). *The development of cabinet government in England*. Macmillan.

Blauvelt, M. T. (1904). Parliamentary England: The evolution of the cabinet system. By Edward Jenks, MA, Reader in English Law in the University of Oxford. [Story of the Nations Series.] (New York: GP Putnam's Sons; London: T. Fisher Unwin. 1903. pp. xix, 441.). *The American Historical Review, 9*(3), 563–565.

Christoph, J. B. (1975). A comparative view: Administrative secrecy in Britain. *Public Administration Review,* 35 (Jan./Feb., 1975), 23–32.

Croham, L. (1985). Would Greater Openness Improve or Weaken Government? The Chancellor's Lecture 1984. University of Salford.

Crossman, R. (1971). The real English disease. *Private Eye*.
Diamond, P. (2013) *Governing Britain: Power, politics and the prime minister*. I.B. Tauris.
Evans, M. (1995). *Charter 88: a successful challenge to the British political tradition?*. Dartmouth Publishing Group.
Evans, M. (2003). *Constitution-making and the Labour Party*. Basingstoke: Palgrave Macmillan.
Frohnen, B. (2001). Tradition, habit, and social interaction: A response to Mark Bevir. *Humanitas, 14*(1), 108–116.
Gamble, A. (1990). Theories of British politics. *Political Studies, 38*(3), 404–420.
Garnett, M., & Lynch, P. (2014). *Exploring British politics*. Routledge.
Greenleaf, W. H. (1983a). *The British political tradition: The rise of collectivism. Volume One*. Routledge.
Greenleaf, W. H. (1983b). *The British ideological tradition: Volume Two, The ideological heritage*. London: Methuen.
Greenleaf, W. H. (1987). The British Political Tradition: A Much Governed Nation. London: Methuen.
Grimstone, G. (1987). Privatisation: The unexpected crusade. *Contemporary British History, 1*(1), 23–25.
Hall, M. (2011). *Political traditions and UK politics*. Palgrave Macmillan.
Harden, I., & Lewis, N. (1988). *The noble lie: the British constitution and the rule of law*. London: Hutchinson.
Hay, C. (2002). Political Analysis. Basingstoke: Palgrave Macmillan.
Hay, C. (2004). Interpreting British governance. Public Administration, *82*(2), 525–527.
Johnston, J. (1999). Britain's Economic Decline: Cultural Versus Structural Explanations. In Marsh. D., Buller, J., Hay, C., Johnston, J., Keer, P., McAnulla, S., Watson, M. (Eds.). *Postwar British politics in perspective*. Cambridge: Polity Press.
Kavanagh, D. (2003). British political science in the inter-war years: the emergence of the founding fathers. *The British Journal of Politics & International Relations, 5*(4), 594–613.
Kenny, M. (1999). Ideas, ideologies and British tradition. In I. Holliday, A. Gamble, & G. Parry (Eds.), *Fundamentals in British politics*. Basingstoke: Palgrave.
Kenny, M. (2014). *The politics of English nationhood*. Oxford University Press.
Kerr, P., & Kettell, S. (2006). In defence of British politics: The past, present and future of the discipline. *British Politics, 1*(1), 3–25.
Kisby, B. (2007). Analysing policy networks: towards an ideational approach. *Policy Studies, 28*(1), 71–90.
Marquand, D. (1988). *The Unprincipled Society: New Demands and Old Politics*. London: Fontana.
Marquand, D. (1992). *The progressive dilemma*. Vintage.

Marquand, D. (2010). *Britain since 1918: The strange career of British democracy.* Hachette UK.
Marsh, D., & Hall, M. (2007). The British political tradition: Explaining the fate of New Labour's constitutional reform agenda. *British politics, 2*(2), 215–238.
Marsh, D., Richards, D., & Smith, M. (2003). Unequal plurality: Towards an asymmetric power model of British politics. *Government and Opposition, 38*(3), 306–332.
Marsh, D., Richards, D. D., & Smith, M. J. (2001). *Changing patterns of governance in the United Kingdom: Reinventing Whitehall?*. Palgrave.
Marsh, D., & Tant, T. (1989). There is no alternative: Mrs. Thatcher and the British Political Tradition. Department of Government, University of Essex.
McAnulla, S. (2006). *British politics: A critical introduction*. London: Continuum.
McAnulla, S. (2007). Understanding tradition in British politics and beyond. *Working Paper No. (24)*, University of Leeds Polis.
Moran, M. (2003). *The British Regulatory State: High modernism and hyper-innovation: High modernism and hyper-innovation*. Oxford University Press.
Moran, C. (2012). *Classified: Secrecy and the state in modern Britain*. Cambridge University Press.
Norton, P. (2010). The British Polity (5th Ed.). Oxon: Routledge.
Ponting, C. (1990). *Secrecy in Britain*. Oxford: Wiley-Blackwell.
Rhodes, R. A. W. (2011). *Everyday life in British government*. Oxford University Press.
Richards, D., & Smith, M. J. (2002). *Governance and public policy in the United Kingdom*. Oxford: Oxford University Press.
Richards, D., & Mathers, H. (2010). Political memoirs and New Labour: Interpretations of power and the 'club rules'. *The British Journal of Politics & International Relations, 12*(4), 498–522.
Roberts, C. (1966). *The growth of responsible government in Stuart England*. Cambridge University Press.
Rowat, D. C. (1979). *Administrative secrecy in developed countries*. London: Macmillan.
Royal Commission on the Reform of the House of Lords. A House for the Future. London: HMSO (Cm 4534).
Tant, A. (1993). *British government: The triumph of elitism: A study of the British political tradition and its major challenges*. Dartmouth.
Taylor, H. (1836). The Statesman. (revised edition 1992). Westport, CT: Praeger.
Vincent, D. (1998). *The culture of secrecy: Britain, 1832–1998*. Oxford: Oxford University Press.

CHAPTER 3

UK Regulation: The Self-Regulatory Ideal

Introduction

The previous chapter unpacked the literature on the BPT, setting out how it has been employed by a range of authors as an organising perspective of British politics. At the core of this literature is the maxim that ideas *matter*. The BPT offers an account of British politics that emphasises the role of ideas in structuring political behaviour. It provides a theoretical framework that has the potential to illuminate 'the way in which institutional and structural complexes are refracted by and interwoven with axiomatic beliefs, modes of reasoning and meaning systems' (Shaw 2012: 229). Thus, in addition to a body of literature that provides a 'meta-theoretical orientation' to scholarly observers of British politics, the BPT is also seen as providing a cognitive map to political actors in the milieu of Westminster and Whitehall (Diamond 2013).

The BPT is used as a heuristic device that acts as a mental short-cut enabling individual actors to navigate a complex and fast-moving world, in which information is always partial and imperfect, events unpredictable and time pressures relentless (Rhodes 2011; Shaw 2012). The BPT, therefore, operates 'as a lens, focusing attention on particular dimensions of politics, identifying difficulties, proposing diagnoses, defining causal sequences and offering solutions' (Lau and Sears 1986: 352; Schon and Rein 1994: 30). The notion of the BPT, therefore, has a dual meaning:

D. Fitzpatrick, *The Politics of Regulation in the UK*,
DOI 10.1057/978-1-137-46199-5_3

it is seen as the dominant 'frame' applied by actors (both consciously and subconsciously) in Westminster and Whitehall when interpreting ideas and events (what Bevir and Rhodes [2003] call *dilemmas*); and the body of scholarly knowledge that has sought to analyse and explain the dialectical interaction between ideas and institutions in British politics.

In this sense, political actors operate on the basis of a perceived, rather than objective, reality; the real world can only influence behaviour in the way it is perceived and understood. In Hay and Rosamond's words, it is 'the ideas that actors hold about the context in which they find themselves rather than the context itself which informs the way in which actors behave' (2002: 147). This is not to deny the existence of an objective reality, nor is it to negate the impact of institutional and structural factors, least of all to argue that *only* ideas matter (Shaw 2012). The conception of the BPT incorporates a dialectical relationship between the ideational and the material. There is an appreciation of how particular ideas of democracy underpin the origins and reproduction of more tangible political institutions and practices (Tant 1993: 5). As Tant (1993: 90) explains:

> ideas do indeed prompt action, and therefore 'explain' political behaviour, but when a system of ideas becomes dominant, those ideas instigate institutions and conventions which then reflect their values in practice. Political traditions do not exist in a vacuum, but in an institutional context which expresses the acceptance that these things must be done. In turn this tends to confine questioning of the system in terms of whether these things need to be done in this way rather than another way: how function should be fulfilled rather than whether it is still relevant or should be superseded.

While the focus of the classical and more recent critical literature on the BPT has been on Westminster and Whitehall, this study seeks to cast the net wider to consider its impact on individuals and organisations in the extended regulatory state and beyond. While regulation is seen to operate on an ordered system of rules, that order is conceived in cultures and norms that shape behaviour. Regulatory policy-making takes place in a structured context influenced by deeply entrenched state traditions (Dyson 1980) and 'belief systems' (Sabatier 1988) that define the proper role of the state and the scope of public responsibilities (Eberlein 2001: 46). This study follows a small group of authors (see Moran 2003; Bartle et al. 2002) who in writing about the history of (state) regulation in the UK have identified, or at least alluded to, a relationship between

a dominant political tradition and a distinctive British regulatory model. The wider comparative literature on regulation (Vogel 1986; Jordana and Levi-Faur 2004b) also implies that different countries have distinctive regulatory systems that 'bear the clear imprint of political tradition (notably inherited ideas about the nature and role of the state)' (Dyson 2002: 52). Following this literature, it is argued here that the development of UK regulation has been shaped by an 'elitist conception of statecraft' (Evans 2003: 313).

In establishing a dialectical relationship between the prevailing political tradition of a country and the culture and practice of regulation, 'we would expect the regulatory state to be a subset of the wider state system; and since regulation was a major proportion of public activity, we would expect the character of public life to be itself deeply affected by the character of regulatory institutions' (Moran 2003: 32). Despite globalisation, most regulatory regimes are firmly embedded in domestic settings. As such, divergence of national styles of regulation is likely; reflecting the different political traditions, institutional structures and modes of interest group intermediation across nation-states (Dyson 2002). In Germany, the tradition of *Rechtsstaat* (state governed by law) gives primacy to the procedural requirements of policy-making, which supported by strong constitutional and administrative courts, has tended to provide a strong normative and formulaic code to regulation (Dyson 1980, 2002). However, that is not to suggest that political traditions are an ineluctable force: as Elgie (2003, 2006) suggests the creation of independent regulatory agencies in France marked a radical break with the established *etatiste* tradition, in which the hierarchical state directly controls rather than delegates decision-making.

It is important to recognise that regulation is contingent, 'subject to reconception and restructuring through purposive political interaction' (Meidinger 1987: 376). Many existing analyses, however, fail to examine, 'first, the role that ideas or culture have in relation to the structure-agency problem, and second, the way in which ideas affect both institutions and outcomes' (Marsh et al. 2001: 11). Akin to structure agency, this book considers the relationship between the ideational and the material to be dialectical: ideas do not exist in a vacuum, but in a material context that relates both the institutions and processes of government and the wider power relations in society.

It is crucial therefore to contextualise any programme of regulatory reform, highlighting the contingency and unintended consequences that affect its impact on the dominant political tradition(s) in a country.

To reiterate Hay's observation, change does not equate to total discontinuity; political traditions, even where they are subject to direct challenge, will invariably have a latent, residual effect on the institutional design or operationalisation of regulatory regimes. In the case of France, for example, government elites continue to enjoy extensive powers to mould regulated markets, in keeping with the 'Napoleonic conception of hierarchy' (Jorion 1998: 42 cited in Elgie 2006: 215); the consequence being that the French 'regulatory state' remains distinct from other national regulatory regimes in broadly similar liberal market economies, such as Britain (Thatcher 2007). In this complex process of change and reform, aspects of the prevailing political, administrative and regulatory traditions of a nation-state may be reaffirmed and reanimated as well as diminished. Notwithstanding the effect of sectoral and international dynamics, the 'global diffusion of regulatory capitalism' (Levi-Faur 2005) has not resulted in an irresistible convergence of regulatory styles and approaches (Richardson 2013). Comparative research has highlighted the continued cross-national variations between the regulatory regimes of different countries, including: the mode of intervention (active vs. reactive), the level of integration (comprehensive vs. fragmented), the flexibility of rule formulation and implementation (legalism vs. pragmatism), the tenor of regulator–regulatee relations (adversarial vs. consensual) and the nature of organisation (formal vs. informal) (Jordana and Levi-Faur 2004b; Van Waarden 1995). Britain has been frequently selected as a case study in this national patterns approach; a number of authors have invoked the notions of a national style, model or approach (Vogel 1986; Lodge 2002; Thatcher 2002; Bartle and Marchant 2003) when describing the practice of regulation in the UK as distinctly British.

The British Regulatory Tradition

In this scholarly context, it is now widely accepted that complex reality of regulation bears little resemblance to a straightforward economic rationale of maximising allocative efficiency; it is viewed as an inherently political process, characterised by strategic calculation and political expediency as much as economic modelling (Prosser 1999; Jordana and Levi-Faur 2004b). Some socio-legal scholars have also demonstrated that the distinction between economic and social regulation is a false dichotomy; the theory and practice of regulation is suffused with normative debates on welfare and distributional issues drawing on rights-based arguments and

the values of universal service, equity and safeguarding of the vulnerable (Prosser 2000, 2010; Graham and Prosser 1991). The enmeshment of national regimes of (economic and social) regulation in these wider normative debates has created a complex political landscape; as Jordana and Levi-Faur (2004a: 2) observe, it is difficult to distinguish between rhetoric and reality and ascertain 'the political forces that sustain, promote and diffuse the regulatory state'.

The political character (or colour) of the regulatory state is not static: it is fluid and evolving and can transmute according to the particular purpose it is ascribed. In the context of privatisation, regulation has often been depicted as part of the neoliberal order and the key mechanism for the promotion of competition in networked industries dominated by an incumbent or oligopoly; what Steven Vogel (1996) characterised as 'freer markets with more rules'. As Jordana and Levi-Faur (2004b) explain, this is somewhat surprising given that, historically, economic liberals have viewed regulation and competition as 'deadly enemies' (Stigler 1975: 183). Indeed, regulation, in the USA in particular, was inextricably linked to 'progressive' forces in politics that sought to curb the power of entrenched business interests from the late nineteenth century (cf. Kolko 1967). The association between regulation and the left was much more ambiguous in Britain and Europe, due in large part to the spread of nationalisation in the inter- and post-war eras.

The changes in the capitalist political economy of many liberal democratic states in the 1980s and 1990s, centring on the privatisation and liberalisation of former publicly owned enterprises, have been characterised as deregulation and a shift back to a smaller, less positive state redolent of the nineteenth century (Hills 1986; Ernst 1994). Denationalisation and the delegation of control to regulatory agencies form an important pillar of the 'hollowing out' of the state thesis (Rhodes 1997). In terms of regulation, this is the claim that the state has voluntarily, and irrevocably, ceded a significant degree of the executive power to independent agencies that place constraints on the ability of government to intervene in (economic) regulation in order to maintain the confidence of business (Rhodes and Dunleavy 1995; Gilardi 2005). Other regulatory studies, in line with so-called third wave of governance literature (Holliday 2000; Marsh et al. 2003; Marinetto 2003), have suggested that the process of regulatory reform over recent decades is largely state-initiated and controlled at the meta-level; regulation, therefore, cannot be explained solely by reference to the 'structural' power of business and can be orientated

towards a variety of economic and social goals beyond a narrow neoliberal project (Braithwaite 2008).

Given the centrality of the different normative perspectives of the regulatory state to the academic discourse, the impact of core political ideas and values on regulatory design and practice has received surprisingly scant attention. While the link between political traditions and modalities of regulation is appealed to in accounting for cross-national variation, there is an absence of theory on how the ideas underpinning those traditions (e.g., on representation and responsibility) have shaped the contingent process of regulatory development. This book aims to address that lacuna. It is posited that the theory and practice of regulation in the UK exhibits particular core features—such as elitism, flexibility, informality, secrecy and discretion—that distinguish it from the regulatory approach of other advanced capitalist democracies. It is claimed that these distinctive characteristics are derived from the elitist conception of democracy implicit in the BPT. The conceptions of representative and responsibility at the core of the BPT shape, for example, how individuals approach and evaluate the design and implementation of regulation. Although this 'proceduralization' is viewed as technical exercise in much of the regulation literature, it is underlain by normative concerns about the role of elites, stakeholders and the general public in that decision-making process (Black 2000).

Reflecting the BPT, UK regulation has invariably been characterised by limited or weak forms of public participation and engagement. The formulation and implementation of (economic, social and environmental) regulation have typically taken place in private negotiations led by civil servants and regulatory officials in selective consultation with the key affected (economic) interests (Jordan and Richardson 1982). The goal of this consultation is to reach a general level of consensus about the best way forward. Traditionally, the details of these 'regulatory bargains' (Rossi 2001, 2005) are not disclosed to the public: 'the government limits access to information in the belief that a passive public will accept what the government think is in the public interest' (McCormick 2013: 11). British regulatory practice is also distinguished from both European and American regulatory regimes in the extent to which the courts are marginalised and by the absence of a distinctive body of administrative or public law separate from private law.

UK regulation lacks the clear legal boundaries provided by a coherent set of constitutional principles; in contrast to continental European nations, such as France, where the principle of public service as a right of

citizenship is enshrined in law (Prosser 2001). In line with Britain's uncodified constitution, the principles of public service operated as unwritten and largely unspoken conventions; the public service ethos of the British civil service emerged through the repeated actions and behaviour of officials from the nineteenth century to gradually form structuring norms of a 'shared culture' (Prosser 2001: 225). Prosser (2001), for example, discusses how the notion of public service broadcasting was not based on legal constraints and requirements but on an elitist cultural understanding of what would and would not be suitable for public consumption; in the case of the British Broadcasting Corporation (BBC), this was left to discretion of the Board of Governors rather than an independent regulatory agency or a set of statutory guidelines. Thus, in the absence of a corpus of public service law, UK regulation has tended to emphasise self-governance and administrative discretion.

The recurring pattern of self-regulation and limited representation in UK regulation has been premised on an implicit conservative notion of responsibility. Advocates of the British regulatory style have tended to make an appeal to the 'public interest' theory of regulation in their defence of its virtues. At a general level, the public interest theory conceives regulation as the pursuit of the protection and benefit of the public at large (Stigler 1971; Posner 1974); usually through the application of economic regulation to correct market failures, such as externalities, market power, natural monopoly and information problems (Ogus 2004). Although it is common to find references to the public interest in case law[1] and parliamentary legislation, particularly on the regulation of privatised utilities and fair trading (Graham and Prosser 1991; Wilks 1999), finding a clear definition of what it means is difficult (Hantke-Domas 2003).

In the British regulatory experience, the concept of public interest rests on the notions of 'reasonableness', 'moderation' and 'fairness' (Hantke-Domas 2003). These concepts were first invoked in a largely forgotten body of nineteenth-century common law relating to cases[2] concerning access to monopoly services such as docklands, bridges, ferries and early public utilities (also see Prosser 2000; Craig 1991). These cases reflected the contemporary concerns to ensure the interests of society received some level of social protection from the harms created by burgeoning private enterprise. However, they did not provide coherent pattern of consumer protection and were open to broad interpretation (Prosser 2000). In addition to a mandate to protect the public interest, the regulators also had the role of defining what that public interest was in practice. In theory,

the judiciary had the power to intervene and define the public interest in disputes between the regulator and regulated; typically, however, the courts restrained from doing so, only exercising their power of judicial review in rare cases of ultra vires (i.e., where an administrative body exceeds the authority delegate to it by Parliament). As Edlin (2004) explains, this *vires*-based conception of judicial review begins with the recognition that Parliament typically delegates authority to administrative agencies in broad language, leaving some ambiguity as to the precise contours of the agencies' legitimate authority. According to this doctrine, the role of the courts is to determine the specific details in which an agency has exceeded its delegated powers. The role of the judiciary is to effectuate the intentions of Parliament in establishing and empowering the administrative authority whose actions have been challenged: 'Judicial review, on this account, poses no threat to the orthodoxy of parliamentary sovereignty, because the courts are simply enforcing Parliament's intentions when they restrain ultra vires administrative actions' (Edlin 2004: 384). Indeed, the creation of regulatory agencies was seen to obviate the need for the enshrinement of public interest in law (Hantke-Domas 2003). As the Rt. Hon. Lord Woolf of Barnes (Woolf 1995: 63) states: 'When such [regulatory] bodies exist, judicial review pragmatically recognises that they, and not the courts, are the more appropriate means to achieve hands on control.'

The role of the judiciary in limiting administrative discretion is, therefore, ambiguous. In theory, the doctrine of ultra vires restricts the role of the courts to the interpretation of fairness and reasonableness in the performance of public functions according to exact wording of statutory legislation (i.e., parliamentary intention). However, as Lord Woolf observes: 'No statute of which I am aware expressly states that the powers which it confers, should be exercised unfairly or unreasonably' (Woolf 1995: 66). As such, ultra vires is variously described as a 'judicial invention' (Cooke 1994), a 'fairy tale' (Woolf 1995) and a 'fig leaf' (Laws 1995) to the fiction of parliamentary intention in English common law. Despite the difficulties in operationalising the doctrine of ultra vires, however, both the executive and the judiciary remain committed to its continuation as a key legal principle; but, critically, based on a pragmatic case-by-case application rather than codified rules. The preference for administrative discretion and limited role for the courts in regulation are inextricably linked to the origins of the British regulatory state in the nineteenth century.

The Origins of the British Regulatory Tradition: The Self-Regulatory Ideal

Part of the purported exceptionalism of the British model of regulation is its apparent continuity and stability. Due to the conceptualisation of political traditions as constraints on change, it is easy to neglect fact that they often emerge during periods of significant transformation and reform (Shils 2006; Hobsbawm and Ranger 2012). Indeed, the Whiggish portrayal of Britain as a settled and somewhat conservative polity belies its reputation as a politically volatile nation up to the nineteenth century (Wright 2013). UK regulation developed in the historical context of what Hobsbawm termed the 'two revolutions': industrialisation and the French Revolution. The origins of the regulatory state in Britain was decisively shaped by the dilemma of how to create institutions that would protect the right of powerful interests to control their own affairs in the face of increasing demands of the new (industrial) class interests (Moran 2003: 41). Regulation, as a distinctive set of state institutions and practices, emerges in Britain against the threat of popular government in the nineteenth century and is then subsequently consolidated against the rise of formal democracy early in the twentieth century. Through a process of assimilation into the governing elite, regulation provided a key mechanism through which the radical ambitions of the middle class were effectively extinguished. The creation of 'club worlds' for the emerging middle class was a way in which they could assert their dominance over different areas of economic and social life within the established parameters of the British state. UK regulation, therefore, proceeds from the principle that particular elites should be protected from the wider processes of democratic government; its purpose is to buttress the notion that such groups have a right to self-govern without interference from the state. To talk of regulation in the nineteenth century, therefore, is to talk of self-regulation.

Self-regulation is an ambiguous term, which often obscures more than it reveals. Black (1996: 27) defines self-regulation as 'the situation of a group of persons or bodies, acting together, performing a regulatory function in respect of themselves and others who accept their authority'. This broad definition has been used to describe a wide variety of regulatory regimes, ranging from an informal arrangement of voluntary rules and norms developed and monitored by a single body or group of organisations (such as a Customer's Charter devised by a group of small businesses) to a much more formalised system in which the organisations in question

are regulated by an official body created by its members for that specific purpose (such as the Advertising Standards Authority) or underpinned by statutory legislation, as in the case of the legal and medical professions (Baggott 1989). Indeed, a diversity of form is seen to be a defining feature of self-regulation and a distinct advantage over less flexible statutory regulation. Moran (2003: 67) explains that it is better to view self-regulation as a 'regulatory ideology' that can be invoked to legitimise a wide range of institutional arrangements.

Britain, as Baggott argues, has always been 'haven for self-regulation' (1989). Writers such as Hogwood (1983) and Vogel (1983, 1986) have shown that self-regulation has been much more extensive in Britain compared with other advanced industrial democracies. Historically, the prevalence of self-regulation has been accompanied by a style of regulation that has tended to emphasise informal 'cooperation between insiders, rather than of open adversarial conflict' (Moran 2003: 35). Regulators in Britain have traditionally eschewed legalistic instruments of enforcement and pursued strategies of conciliation and accommodation (Vogel 1986). In the emerging regimes of business and professional regulation that developed from the mid-nineteenth century, the emphasis has been on negotiation between the regulators and regulated without formalised procedures and with a marked reluctance to involve the courts and impose sanctions. Moran argues that this culture of cooperation was premised on the Victorian ideal of the 'gentleman'. This is the notion that 'economic actors were gentlemen, with claims to a particular style of treatment by regulators, and with claims to gentlemanly standards that could deliver effective regulation without adversarial controls' (Moran 2003: 43).

This 'gentlemanly ideal' consolidated a regulatory approach that emphasised conciliation and cooperation with powerful interests in industry, the City and the professions in the nineteenth century. Moran examines the origins of this regulatory culture in four nineteenth-century inspection systems: the Factory Inspectorate; the Alkali Inspectorate, a forerunner of air pollution regulation; the Railway Inspectorate; and the inspection of food purity (Moran 2003: 43–47). The literature (Thomas 1948; Ashby and Anderson 1981; Parris 1965; Paulus 1974) identifies a common approach across the different inspectorates that stressed 'the avoidance of compulsion in implementing regulation; of informality and closeness in social relations between inspectors and companies; and even the existence of business connections between inspectors and companies' (Moran 2003: 44). Invoking Marquand's idea of 'club government', Moran characterises

the burgeoning system of industrial regulation, in which relations between the inspectorates and the industrialists were close-knit and based on informal communication and cooperation, as 'club regulation'.

Moran (2003) seeks to problematise the emergence of 'club regulation' and questions why it prevailed over a more adversarial approach, rather than viewing it as preordained. For example, Moran analyses why independent regulatory commissions (such as the Poor Law Commission and the Railway Commission) did not become institutionalised parts of the British regulatory state (2003: 64). As Moran observes, the emergence of the regulatory culture was contingent upon the timing of British regulatory innovation: it is logical that a system of regulation created before the rise of democratic politics, in a society where government was controlled by an oligarchic alliance of aristocratic and bourgeois interests, where business was hegemonic and the state lacked the requisite fiscal and bureaucratic resources, should have taken the path of cooperation and conciliation with powerful industrial interests (Moran 2003: 46–65). The integration of political and economic interests meant the attempt to curb the power of the industrialists through a system of rigorous inspection was unlikely. In some cases, the influence of industrial interests was direct: 'railway interests, for example, were powerfully represented in both Parliament and Cabinet throughout the second half of the nineteenth century' (Moran 2003: 45). Such influence helped resist legislative incursions into the self-regulatory domain of industry. Where legislation was passed, the influence of powerful economic industry meant regulation was invariably light-touch and trust-based. Regulatory offences, moreover, were regarded as technical breaches of the rules, separate from the domain of criminal law and were enforced largely through persuasion, bargaining and warning (Moran 2003: 47). In this sense, not only was the regulation of industry depoliticised, but 'gentlemanly' offences were decriminalised. The paucity of resources available to the inspectorates exacerbated these inequalities of power between the regulators and the regulated. Regulatory institutions in the nineteenth century, reflecting the lack of administrative resources within the Victorian British state generally, were poorly equipped. The disparity in resources—in terms of personnel, information and technical expertise—between regulators and the regulated industries inevitably meant inspection by the former could not function without the cooperation of the latter (Moran 2003: 46).

The ideal of Victorian gentlemanly capitalism was embedded into the philosophy and practice of (self-)regulation in the twentieth century. Indeed, as recently as the beginnings of the 1970s, the Robens Committee

(1972: 63 cited in Moran 2003: 62) was told by 'the responsible government departments and inspectorates' across the whole range of health and safety that they:

> tended in their evidence to describe their primary function in terms of improving standards of health and safety at work, rather than in terms of law enforcement as such, while inspectors regard the threat of legal sanctions in the background as important, in practice they find that in most cases advice and persuasion achieve more than duress. They have learned from experience that recourse to legal sanctions is only one means of achieving objectives of safety legislation, and that it is rarely the most apt or effective.

Scholarly research also shows that despite some differences, the regulatory tradition of its Victorian founders was prevalent among the attitudes of regulators in different sectors in the twentieth century. The Nuffield School conceived the regulation of the industrial relations system as one where law was the opponent of trust and flexibility. Hawkins' ethnographic study of water quality control shows how both regulators and the regulated industries sought to avoid the literal interpretation of the law, in order to practice cooperative and trust-based regulation. A study of the various different inspectorates across British government, found that discretion and judgement were the essential criteria for evaluating standards and a reliance on persuasion and advice rather than sanctions was employed as a means of enforcing them; their powers of coercion are simply 'a historical survival' (Rhodes 1981: 199). The research conducted by Rhodes is premised on the assumption that 'the main purposes for which inspectorates were established in the nineteenth century … still constitute a major part of the inspection work of government' (1981: 1). This is not to say, however, that the system of inspection that prevailed in the nineteenth century could be superimposed onto the different circumstances in the twentieth century: following the advent of democratic politics in 1918; the development of a bureaucratic state with considerable administrative resources; and the emergence of a labour movement with strong political and industrial wings.

Enforcement and Compliance: 'Moral and Political Ambivalence'

The lack of clarity surrounding 'the public interest' and the authority of agencies has been related to a normative vacuum at the heart of UK regulation; described by Hawkins (1984) as 'moral and political ambivalence'.

It has been claimed that UK regulators do not generally possess the same 'secure moral mandate' to intervene and sanction deviance from the rules as other enforcement agencies of the state, such as the police (Hawkins 1984: 13). The moral and political ambivalence of regulation has usually been attributed to the peculiar features of regulated economic activity, which distinguish it from 'traditional' crimes: the externalities (or social harms) of economic enterprise tend to vague and amorphous, often lacking a clear, identifiable link to the perpetrators (notwithstanding mens rea) and victims, and only becoming apparent over a long period of time. For instance, although both can be manifested acutely in specific emergencies and incidents, the externalities and harms of both environmental degradation (such as agricultural run-off) and occupational health and safety (such as asbestos exposure) are more commonly the result of long-term, prolonged processes. Socio-legal scholars, such as Hawkins (1984), have argued that breaches of regulatory rules lack the 'drama' needed to secure an uncontested authority to intervene and sanction such deviance decisively. Moreover compliance with regulation often demands that organisations (rather than individuals per se) take some positive course of action, rather than merely restraining from particular prohibited behaviours (Reiss Jr 1983). As such, the enforcement of criminal law is normally considered to be functionally separate from regulation 'on the basis that it seeks to punish antisocial conduct rather than encourage particular forms of purposive activity' (Baldwin et al. 1998: 3).

In this context, *regulation*, defined as the management or steering of legitimate markets, is contrasted with policing, which is normally conceptualised as the *repression* of illegal enterprises. As Hawkins (1984: 10) observes, 'regulation implies a degree of tolerance about the activity causing concern, rather than its elimination'. Put simply, the goals of policing and regulation are seen to be fundamentally different: the objective of policing is considered to be the eradication of certain deviant behaviours; while the aim of regulation is often to elicit positive changes in behaviour or practices (cf. Gill 2002). Rarely does regulation seek to stop a particular economic activity altogether. Regulation is therefore seen to rest on an inherent compromise between the benefits and harms of unfettered economic activity. The official and academic discourse, in comparison, tends not to explore the potential social value of crime; although some scholars, such as McChesney (2001), have argued that in particular circumstances some crimes, such as corruption, can have wider social benefits. Hence, although it is considered axiomatic that traditional crimes

warrant state intervention, the moral ambiguity of regulatory breaches, where mens rea or blameworthiness conduct is difficult to establish, necessitates a significant extent of interpretation and evaluation. As such, Hawkins (1984: 10) argues, 'As soon as we talk of "regulation" rather than repression we admit the necessity of discretionary enforcement.' The susceptibility of regulation to accusations of ultra vires, moreover, means regulators are orientated towards adopting the compliance approach, in which they are compelled 'to manufacture the appearance of activity. ... the symbolic reality of impact, the fiction of real power' (Manning cited in Hawkins 1984: 10).

The central position of discretion in the British conception of regulation has resulted in an academic focus on the study of enforcement. Early socio-legal work on enforcement focused on the approach of officers to compliance and sanctioning (see Cranston 1979; Richardson et al. 1982; Hawkins 1984; Hutter 1988, 1997), while more recently scholars have begun to explore the ways in which business made sense of and responded to attempts to regulate their behaviour (Gunningham et al. 2003; Axelrad and Kagan 2000). There are meso-level (the nature of the interaction between regulator and regulatee) and micro-factors (the type of firm and its own organisational culture and practice) that are likely to influence the practice of regulation. A number of socio-legal studies (Hawkins 1984; Black 1997, 2001) highlight how the formulation of legal rules and the range of sanctions provided shape the approach of regulators, in terms of their construction of compliance and response to non-compliance. Another key determining factor is thought to be the characterisation of the particular firm, industry or sector—most frequently divided according to Kagan and Scholz's (1984) taxonomy of 'amoral calculators', 'political citizens', 'organisationally incompetent' and 'irrational non-compliers' (cf. Gunningham et al. 2003)—from the vantage point of the regulator (invariably conceived as the individual enforcement officer).

Studies of UK regulation that allude to a particular style or model have often focused on single or small *n* case studies of particular regulatory agencies, such as regional water authorities (Hawkins 1984), the Health and Safety Executive (Hutter and Manning 1990) and environmental health (Hutter 1988). The nature of these agencies, which are staffed by a large body of individual enforcement officers, gives rise to personal one-to-one relationships, with low 'relational distance' (Black 1976) between the regulatory and regulatee; particularly in large multinational companies, with specialised compliance divisions, where interaction is likely to

be frequent and open-ended (Gunningham et al. 2003). As such, these micro-sociological studies, often using ethnographic methods, tend to place a great deal of emphasis on individual agency (Lange 1998). The aim of socio-legal research is often to illuminate, via empirical analysis, 'the ways in which rules, ideas, and practices actually function in legal decision making and how they affect social life' (Kagan 2000: 5). However, this focus on the specific regulatory bodies and often the individual enforcement officer can lead these authors to assume a high degree of rationality on behalf of the regulators, suggesting that they constantly involved in a strategic calculation of the costs and benefits of enforcement in the context of the rules and sanctions provided by the legal system.

Studies of regulatory enforcement are usually grounded in the criminological theory of deterrence, which takes the individual as its unit of analysis. Although socio-legal studies have tended to focus on the regulatory agency or firm in their analysis of enforcement and compliance, they retain much of the economistic and instrumental character of deterrence theory (Kagan and Scholz 1984). Early socio-legal theorising on regulation, enforcement and compliance proceeded from the organising assumption that firms are rational actors that will comply with legal directives only to the extent that the costs of expected penalties exceed the benefits of non-compliance (Hawkins 2013). More recent research (Gunningham et al. 2003) has introduced the notion of 'beyond-compliance' corporate policies and behaviour; however, this is conceived as being in the self-interest of business, so remains within a normative framework where commercial objectives always trump values of environmental protection.

Further development of the theory of regulatory enforcement assumes an almost unbounded rationality on behalf of enforcement officers, who are so well-attuned to nature of the sector, attitudes of the firm, past compliance record and wider political and regulatory context that they are able shift adeptly from strict policemen, to conciliatory politician or educative consultant and back again according to their evaluation of the particular case. This is not to suggest that these authors do not recognise the wider contextual and structural factors that influence regulatory decision; socio-legal research has been cognisant of the ways in which both regulator and regulates construct the concept of compliance according to their own codes of 'regulatory justice' (Kagan 1978). The rationality employed therefore is 'substantive', drawing on ethics and values, as well as 'practical' and 'formal' (Weber 1978). Corporate behaviour and responses to regulation have been shown to be complex and multifaceted

and open to influence from social and political factors as well as legal constraints and economic imperatives (Gunningham et al. 2003). The distinction between the different modalities of rationality is not fully explored, however; while far from an economistic rational-choice approach, most socio-legal research is underpinned by the notion that individuals, on both sides of the regulatory encounter, are motivated by a 'strong instrumental concern' to maximise utility, whether economic or organisational, 'with pragmatism, rather than principle, remaining the dominant value' (Hawkins 2013: 959). As Hawkins (2013: 964) comments, 'business instincts remain strong: compliant behavior is not necessarily altruistic, but the result of a strategic conception of what is in firm's best interests—a conception, however, motivated by forces beyond a crude cost-benefit calculation'. As such, these scholars tend to underplay the role of the wider ideational context on the practice of regulation.

However, others have noted how the characterisations or 'images' applied by regulators to particular regulatees depend not so much on objective empirical assessments of their attitudes or past record on compliance, but subjective framing based on their own perception of their role. Rather than the 'image' of the firm determining the regulatory approach, the desired regulatory approach determines the image (Black 2001). Richardson et al. (1982) observe a 'striking coincidence between officers' own preference for a cooperative approach and their attribution of non-compliance to those causes that could best be dealt with by that approach'.

In the UK, regulation and enforcement are often depicted as an incremental and iterative process, directed towards compliance. Compliance therefore is seen as a process rather than an event. Regulatory scholars (Hawkins 1984; Black 2001) have argued that the incremental pace of compliance is mainly attributable to the dynamic and fluid nature of regulated activity (such as pollution control) and the functional and technical aspects of the regulatee (due to size, organisational competence, and the availability and affordability of technology). In such a regulatory context, Hawkins (1984: 197) argues, 'To insist on *instant* compliance is an affront to moral sensibilities about what is *reasonable*' (my emphasis). Hawkins (1984) and other studies of regulatory enforcement (Hutter 1988, 1997) imply that the characterisations of what individual enforcement officers consider as legitimate action is derived from the professional cultures of the agency (Lange 1998). However, the link between the professional cultures of the particular agencies in question and the wider narratives of regulation and governance in Britain is left underexplored.

The argument presented here is that these normative characterisations of legitimate regulation and enforcement are inscribed with ideas and values at the core of the British regulatory tradition. Moreover, the aversion to resort to legal sanctions that may produce short-term gains over putative long-term positive change also derives from wider understandings of 'progress' in the BPT. The preference for 'graduated compliance' is redolent of the Whig developmentalism and the emphasis on consistency and prudence inherent in the BPT. In a similar Whiggish vein, defenders of the UK regulation tradition have appealed to the progress made over the long term, acclaiming the adaptability, and therefore by definition the continuity, of the regime with its antecedents in mid-nineteenth century. The evolution of UK regulation is therefore part of larger story told about the excellence of the BPT: a story that celebrates 'the balance achieved between the different elements of the constitution … the establishment of a set of political institutions which fostered compromise and tolerance … the flexibility and foresight of the governing class and the resulting responsiveness of British institutions to new demands and pressures' (Gamble 1990: 407–408).

Just as the Whig interpretation of history was premised on a 'British school' of political science that privileged 'discursive historical and philosophical reflection on the past' (Gamble 1990: 408), the dominant narrative of UK regulation has been informed by empirical studies of regulation that are similarly 'inductive, discursive and reflective' and aim to inform its future practical application (although subsystems theory has provided an alternative methodological approach; see Lange 1998). In these empirical socio-legal studies, regulation is conceived as 'the product of the day to day interactions of regulators and regulatees' (Black 2001: 9). In focusing on the *practice* of regulation, these studies have tended to emphasise the merits of a gradualist and proportionate approach to compliance, in a similar fashion to how the traditional British school of the 'noble science of politics' (Collini et al. 1983) commended the 'practical wisdom embodied in England's constitutional arrangements' (Gamble 1990: 409). For instance, in summarising the key findings of the academic studies of enforcement, Black (2001: 7) claims: 'enforcement officers must display patience and tolerance rather than legal authority for the goal is not to punish but to secure long term change'.

Notwithstanding the empirical differences between policing 'crime' and regulating economic activity, much of the socio-legal literature has neglected the role of ideas in shaping the nature of regulation in the

UK. The supposed political and moral ambivalence of regulation that Hawkins observes is the result of embedded (and hidden) presence of ideas, values and norms rather than their absence. The lack of a strong legitimising basis for UK regulation can be traced back to the contested nature of its origins (between different publics) in the nineteenth century, when a weak notion of state intervention led to tentative incursions into social and economic life. The moral and political ambivalence of regulation is thus related to the inherent ambiguities of the British liberal democratic state and its development over time. The moral ambivalence of UK regulation is not surprising given the British state's qualified commitment to wider democratic principles. Indeed, Wright (2013: 14) claims Britain was and arguably still is a 'reluctant kind of democracy'. It accepted mass democracy, in R.H. Tawney words, as a:

> convenience … she did not dedicate herself to it as the expression of moral idea of comradeship and equality, the avowal of which would leave nothing the same. She changed her political garments, but could not her heart. She carried into the democratic era, not only the institutions but the social habits and mentality of the oldest and toughest plutocracy in the world. (cited in Terrill 1973: 173)

Tawney's argument was that Britain was not really a democracy at all; the theories of representation and responsibility were legitimising mythologies that masked the continuity in the relations of power between the eras of aristocratic rule and putative mass democracy. The type of elite rule and passive citizenship that continued to characterise the British polity in the nineteenth and twentieth centuries were, at best, an extremely minimalist version of democracy, and at worst irreconcilable. Reflecting on this Tawneian tradition, Marquand (1993: 220) argues 'that democratic institutions without a democratic culture are like clothes without a body; and that a democratic culture is, above all, a culture of self-government, a culture of the civic or republican virtues'. In this sense, the British regulatory tradition is a culture or ideology of regulation that is derived from a deeper conception of democracy and the role of the state. It conceives of a polity where the participation of the citizenry in the policy process is highly circumscribed and legitimate state intervention is restricted to the role of an 'arms-length arbitrator' between different interests and audiences (Schmidt and Thatcher 2013: 7).

A flaw in the existing literature on UK regulation, with the notable exception of Moran (2003), is that it fails to critically analyse the underlying normative foundations and material realities of the 'ambivalence' of UK regulation. The orthodox compliance view of regulation, associated with the Oxford School on the Socio-Legal Study of Regulation, reflects the key features of the British regulatory tradition without problematising their emergence, consolidation and reproduction. It presents a naturalised view of the British regulatory tradition in a similar fashion to the classical authors of the BPT. The key characteristics of discretion, informality and pragmatism are viewed as the inevitable outcome of a discursive environment in which the state is seen to lack the requisite moral authority to intervene decisively. In contrast, this study seeks to problematise these aspects, by examining their relationship to the wider governing code of the BPT. The following section explores how the relations of power between elites in the nineteenth century shaped the character of the embryonic development of regulation in Britain, orientating it in a distinctly self-regulatory direction.

Pressures for Change

In order to survive, the British regulatory tradition has been forced to resist and adapt to several challenges. The development of the 'new' British regulatory state may be seen as reflecting a belief that the informal and 'club' modes of governance constructed in the Victorian period were outmoded, not democratically accountable, and were a likely cause of Britain's economic decline in the post-war period (Moran 2003). The British regulatory tradition, therefore, should not be viewed as a static concept. Its evolution has been borne out of challenges to its traditional ideas, values and practices, and the resistance and in some cases assimilation of those challenges. Regulatory reform and crises are familiar bedfellows (Braithwaite 2008). Indeed, since its emergence in the nineteenth century, the British regulatory tradition has undergone an iterative process of 'embedding': to successfully embed the old system in the new world of formal democracy often meant reshaping it to fit new surroundings (Moran 2003: 56). Its evolution in the late twentieth and early twenty-first centuries is marked by further challenges and adaption to that dominant tradition.

The post-war era witnessed a significant decline in the traditional self-regulatory domains that were established in the nineteenth century. The 'original' professions of medicine, law and finance were brought more firmly under the gaze of the state (Blass 2010). Some professions, such as teaching, have been subjected to highly intrusive regimes of direct state regulation; others have been forced to shift from a voluntary to a statutory framework, such as the financial sector following the Lloyds Act of 1982 and the 1986 Financial Services Act. Recent scandals in the financial sector, the NHS and the press media have seen a further racheting up of the scope and scale of the regulatory state. The result is that genuinely pure self-regulation, which is entirely voluntary and self-imposed with little explicit state support, is 'almost extinct' in practice (Bartle and Vass 2005: 21).

In the 1960s and 1970s, the dominant political and regulatory traditions in the UK foundered on a series of recurring political and economic crises (Bevir and Rhodes 1999). These decades were marked by rising social and industrial discontent and a growing recognition of Britain's long-running relative economic decline and shrinking political status (Kerr and Kettell 2006). The optimism of the classical literature on the BPT proved to be fragile. The avowed belief in the prudence and practical sagacity of British institutions was exposed as a veneer, masking deeper pathologies in British politics, which began to abrade soon after the publication of the classical key texts on the BPT in the mid-1960s. In terms of its political status as a Great Power on the international stage, there was an absolute decline: from the ruler of a third of the world at the end of the nineteenth century to the decline of the British empire after 1945; British withdrawal from its invasion of Suez in 1956 because of pressure from the USA; and de Gaulle's 'Non' to UK entry into the EC in 1963 and 1967 (Richards and Smith 2002: 81). This period marked the end of the imperial mission of empire and the exhaustion of Britain's legacy as an industrial and commercial pioneer. Moran (2003: 164) argues this loss of international status and purpose represented a 'full-blown crisis of club government'.

Britain's relative economic decline was exacerbated, moreover, by a number of exogenous and endogenous economic shocks: the collapse of the Bretton Woods system in 1971, the 1973/4 OPEC oil crisis, industrial unrest (especially the miners strikes between 1972 and 1974) and the request of a loan from the International Monetary Fund in 1976 following the devaluation of the pound (Richards and Smith 2002: 83). The perception of decline, together with the internal and external pressures on the Keynesian welfare state, created a climate of crisis during the mid- to late 1970s (see Hay 1996).

In this political climate, commentators on both sides of the political spectrum linked the structural crises to a number of narratives of the British state that emerged in the post-war period, which presented an ideational challenge to the traditional understandings of the British state. Writing in 1976, King depicts the mid-1970s as a time on the verge of political and economic change, when, 'we in Britain can feel the ground shifting, ever so slightly, under our feet' (King 1976: 6). For many, a key source of Britain's difficulties was to be found precisely in its central political institutions and practices (Marsh and Hall 2007). In contrast to the apparent virtues of strong government and stability hailed by advocates of the BPT, a number of scholars (see Finer [1975] on 'adversary politics' and Hailsham [1976] on 'elective dictatorship') began to argue that such attributes were now acting as an impediment to Britain's further economic and political modernisation (Kerr and Kettell 2006). In response, a number of progressive governance reforms[3] were suggested, including changes to the civil service to improve the level of professionalism, to enhance the scrutinising role of Parliament, and to increase the representativeness of the electoral system. However, such proposals remained firmly within the existing institutional context and represented adaptation of the Westminster model, rather than a systematic challenge to the prevailing political tradition on which it is based.

The putative loss of state capacity was linked to wider debates that emerged in the 1960s about the challenges of a top-down approach to policy implementation (Lipsky 1980; Weatherley and Lipsky 1977; Meyers and Vorsanger 2007) and the pathologies of group politics leading to 'pluralistic stagnation' (Beer 1982) and an 'overloaded state' (King 1975, 1976; Crozier et al. 1975). The theories of regulatory discretion and capture developed alongside these narratives on the debilities of the (social democratic, collectivist) state. The risks of regulatory failure have been associated with the incompatibility between traditional hierarchical control and an increasingly complex and fluid social reality.

A central focus of the much of the earlier literature on governance is the inability, or at least futility, of states seeking to 'control society in a conventional command and control mode' (Pierre and Peters 2000: 3). These references to the 'pathologies of command and control' (Hawkins 2002: 15) rely on an ideal characterisation of an imagined regulatory system that bears little resemblance to empirical reality (Tombs 2015: 83). This is an odd state of affairs. More than anyone, Hawkins' ethnographic research on British regulation attested to the dominant compliance approach of

enforcement officers. Nevertheless, the spectre of over-regulation is ever present in the debate on regulation in the UK. The dangers of red tape and burdensome regulation are frequently invoked but rarely given any empirical credence. State regulation based on a strict enforcement approach—'where the state prescribes closely what constitutes compliance and then responds punitively on the basis on a deterrence-orientated approach' (Tombs 2015: 91)—has *never* featured predominantly in any liberal democratic system of corporate regulation, never mind the UK as a haven for self-regulation.

Just as the radicalism of Thatcherism is accentuated by its comparison to a construction of a cosy, post-war social democratic consensus, the effectiveness of the dominant compliance approach has been set against an imagined era of inefficient, overbearing, top-down command and control regulation. I do not seek to defend the merits of such a top-down regulatory approach but rather to highlight that such an interpretation does not reflect the empirical reality of any period of state regulation in the UK. Nonetheless, the imagery of this 'invented tradition' (Hobsbawm and Ranger 2012) has proved powerful. A number of politicians have found it to be highly convenient myth, which can be invoked in order to appear radical and innovative while also protecting their pro-business credentials.

Against this imagery of an overbearing command and control regulatory state, close cooperative relationships between the regulator and regulated, supported by a discretionary and 'reasonable' approach by enforcement officers in the field, have been projected as a key advantage of the British regulatory tradition. In the 1980s and 1990s, however, studies of regulatory commitment (Levy and Spiller 1994; Spiller and Vogelsang 1997) began to rationalise, retrospectively, how the process of privatisation had restricted the regulatory discretion inherent in the traditional British model via the use of licences that have the power of contract law. Discretion and flexibility, seen to be the hallmarks of the British regulatory approach, were thus seemingly sacrificed for credibility and stability; as, 'For contracts to satisfy the first criterion for regulatory stability … they must be very specific and clearly limit what the regulator can do' (Guasch and Spiller 1999: 66). The delegation of responsibility to quasi-independent regulatory agencies, within a contract-based regulatory framework, was part of an episodic strategy of depoliticisation (Burnham 2006). This new 'managerial state' was seen to be underwritten

by a preference for binding rules over discretion and arms-length control over direct intervention.

Concurrent to the development of this neoliberal, managerial and depoliticised state, has been a growing acceptance that successful regulation (whether statutory or otherwise) of the public and private sector is dependent on the resources and cooperation of a wider range of stakeholders, including the general public. The Governance of Britain Green Paper acknowledges that:

> The time has come to build a consensus about the changes that we can make together to help renew trust and confidence in our democratic institutions, to make them fit for the modern world and to begin properly to articulate and celebrate what it means to be British. By rebalancing some aspects of the way power is exercised, the Government hopes to ensure that individual citizens feel more closely engaged with those representing them; able to have their voice heard, active in their communities and bound together by common ties. (Ministry of Justice, Cm 7170, 3 July 2007, para 8)

The broader debates on the 'co-production' (Halpern and Cockayne 2004) of policy and enhanced citizen engagement resonate with the emergence of regulatory innovations such as co-regulation[4] and negotiated settlements (Littlechild 2012). Herein lies what Pierre and Peters (2000) consider to be a 'fundamental paradox' for the new regulatory state. The wider culture of deference, on which the BPT was predicated, has disintegrated over the last 40 years. This decline of deference has witnessed the emergence of a more demanding and critical citizenry who expect government to exercise control and be held to account for failures to secure successful outcomes. Hence, as the Power Inquiry (2006) demonstrates, there is a tension between the emergence of a large section of the electorate in Britain which demands a more regular, meaningful and detailed degree of influence over the policies and decisions that concern them and a political system that (although contingent on that support) has neither the structures, processes or culture to offer that level of participation.

Attempts to re-engage the public in formal democracy have amounted to little more than tweaking of the existing political system, involving the introduction of new technology and circumscribed consultation. Such a technocratic response to the 'democratic malaise' is indicative of the resistance of the BPT to fundamental constitutional change. It has been suggested that the rise of regulation—in the form of the 'audit society' (Power

1999), the decline in some forms of self-regulation (Moran 2003), the rise of the regulation within the state (Hood et al. 1999), as well as the regulation of privatised utilities (Jordana and Levi-Faur 2004a)—is part of this technocratic response, and is a direct attempt to restore public trust in traditional political and economic institutions following many years of political sleaze and scandal (Power Inquiry 2006: 111). Thus, despite its origins in the critique of an overloaded and ungovernable state, the depoliticisation strategy has led to what some have called an 'audit explosion' (Power 2005) and 'inspectoral overload' (Walshe 2002). In this sense, the rise of the regulation can be attributed to what Power (2008) calls the 'remangerialization of risk'; that is, the attempt to subject risk to systematic controls so as to increase confidence in social and economic processes.

In this sense, there is a clear conceptual link between the literature on the 'risk society' and Moran's concept of the hyper-innovative, high-modernist regulatory state. The sociological theory of Ulrich Beck and Anthony Giddens suggests that the nature of late modern society leads to the endemic production of risks. Through the technological and scientific advances of the modernist project, the basic material needs of an increasing proportion of humanity have been successfully met. The epoch of industrial modernity has transmuted into what Beck et al. (1994) term 'reflexive modernity', in which individuals (as well as nation-states and other institutions) are more acutely aware of potential threats to their safety and security. The primary source of these risks, moreover, is mankind's own activities; the consumer products and lifestyle choices demanded in capitalist society create major new risks for those living in it (Beck 1992). However, as Moran (2003) and Power (2008) observe, this expansion of risk management is not without dangers of its own. The interactions between the nature of risk and trust in society and the logic of regulation as a mode of governance are complex and multifaceted (Jordana and Levi-Faur 2004a: 15). In the late modern era, regulation has come to be seen as both 'a source of resilience and prevention, and of vulnerability' (Lodge and Mennicken 2015: 4). Chapter 5 explores how new problems of diffuse pollution, which can be seen as an example of this reflexive modernisation, emerged following large-scale investment and relative success in regulating the known 'point sources' of effluent. This is a useful analogy for our understanding of risk and regulation more generally: contemporary risks tend to be more diffuse, ambiguous and lack clear 'ownership'. Without clear lines of accountability, regulation is invariably invoked as part of the solution to the amelioration of such risks, in the absence of other alternative remedies.

The impact of these pressures has driven a process of regulatory 'hyper-innovation'; the effect of which Moran (2003: 169) argues is the fragmentation of the British model or regulation. Moran claims that the homogeneity of traditional club regulation has been refracted by the creation of new regulatory domains that encompass wider constellations of competing interests, some of which hold fundamentally different normative visions of regulation (Prosser 2010), operating at various tiers of governance, including Europe. In other words, the comparative study of regulation has shifted from a focus on national patterns, exemplified in the work of Vogel (1986, 2003a, b), to a more sectoral approach (Humphreys and Simpson 2005). In this latter approach to regulatory studies, it is technological innovation and the networks of actors that transverse the European and international level that are seen to ultimately shape regulatory regimes, often through different mechanisms of policy transfer rather than national traditions and cultures. However, even within this literature there is a recognition that regulatory regimes continue to reflect national policy preferences and traditions, with policy transfer resulting in a synthesis of principles and institutional designs rather than direct emulation and convergence (Bulmer et al. 2007).

In the context of this research, therefore, it is essential to consider how the BPT, as the dominant paradigm and frame of reference through which actors involved in the regulatory space understand the context in which they must act, has been challenged and possibly replaced by other discourses, such as neoliberalism (Hay 1999: 41). The advantage of this relational approach is 'in its emphasis upon the necessarily partial and provisional knowledge with which all actors appropriate the strategic environment they inhabit' (Hay 1999: 41). It incorporates ideational, perceptual and discursive factors into the analysis.

The Crisis of the British Regulatory Tradition?

The financial crisis that hit the UK in 2008 brought the discourse on regulation into sharp relief. It reanimated the public and political debate on the principles and purpose of regulation. Taking Boin and t'Hart's definition of crisis as a period of 'intense media scrutiny, public criticism, political controversy, and calls for reform', many have concluded that we have entered an era of regulatory crisis (Lodge 2014; Lodge and Mennicken 2015; Fitzpatrick and Diamond 2015). The crisis of the financial sector seemed to mark the end of one of the last vestiges of 'club regulation': an elitist, secretive, informal practice of governance, which privileges self-regulation

and cooperation over intervention and sanctioning. However, others had already foretold the demise of the British regulatory tradition much earlier.

Moran (2003) argues that the club system of government had effectively collapsed in the 1970s under the pressures of globalisation, Europeanisation, neoliberalism and the transmogrification of British civic culture. For Moran (2003), the creation of a (new) British regulatory state rested on the modernist principles of efficiency and competitiveness that were antagonistic to the traditional and pre-democratic precepts of the BPT and its attendant club system of government and regulation. The contemporary British regulatory state, according to Moran, is the outcome of the crisis of the traditional governing code of British political elites and the exhaustion of the institutional logics and practices that it gave rise to. The 'hyper-innovation' of the regulatory state is both the consequence of this wider political crisis and the source of further policy and regulatory 'fiascos' (Moran 2003). For Moran, crisis and the growth of the regulatory state are inextricably linked: 'fiasco is … both a reflection of hyper-innovations and a force driving the state into even greater frenzies of hyper-innovation' (2003: 156).

While the argument here concurs with much of Moran's analysis it seeks to qualify his final conclusion. The evolution of the regulatory state in Britain has indeed been beset by a succession of different crises over the last 15 years, which can be interpreted, on some level, as 'regulatory fiascos'. While the 'Great Financial Crisis' of 2008 represents the most profound regulatory crisis in living memory, it came in the wake of a succession of different, but related crises of the regulatory state (Johal et al. 2012). Perhaps more importantly, it has been followed by a series of further regulatory fiascos. The observed failures of regulation figure prominently in both scholarly analysis and media commentary of a range of scandals that have been exposed in recent years. The following examples represent a small snapshot of crises that have afflicted different levels of government, the state and civil society:

- the adulteration of meat (centring on the substitution of beef for horsemeat) in the UK food supply chain;
- the 'phone hacking' of celebrities, the Royal Family and members of the public by parts of the press media, which was facilitated by paying public officials, often police officers, in exchange for sensitive and confidential information;
- the profligacy and systematic abuse of parliamentary allowances by numerous MPs claiming expenses;

- the latest in a series of recurring 'cash for honours' scandals, which pervade the system of appointment to the House of Lords;
- the clinical failures, and subsequent concealment, by staff in Mid Staffordshire and Morecombe Bay NHS trusts.

While some of these crises (such as the horsemeat scandal) fit into Moran's cyclical framework of a hyper-innovation and fiasco, others do not. The parliamentary expenses scandal, for example, is the result of an ossified and closed institutional practice that had endured well into the era of hyper-innovation. The scandals of Mid Staffordshire and Morecombe Bay NHS trusts reflect the pathologies of a hybrid model of governance comprising the secrecy of the club system and the unintended consequences of a hyper-innovative audit culture. The British regulatory tradition has proved more resilient than Moran expected; although it has been increasingly challenged in recent decades it continues to exert influence on the ideas and practice of regulation in various domains. This is mainly due to the fact that it is underpinned by a broader dominant political tradition that remains sacrosanct for those elites in power. Moran's conclusion of a complete demise of club government is thus premature; there have been important changes to the British regulatory state but not complete discontinuity. Indeed, the continued imprimatur of the dominant regulatory tradition is evidenced by Lodge and Wegrich's (2012) description of the regulatory 'orthodoxy' of the early twenty-first century, which they argue is centred on a belief in the capability and willingness of organisations to regulate and risk manage themselves; a preference for risk-based regulation that stressed proportionality and a discretionary approach to enforcement and compliance; and the view that delegation to specialised regulatory agencies would provide 'depoliticised' expert-led and evidence-based strategies and intervention that would produce efficient markets and 'healthy' public services.

The emphasis on change in Moran's analysis of 'club government' is the result of an institutional focus. He is concerned with the small, closed policy communities populated by 'the overlapping worlds of the core executive … the metropolitan civil service elite in Whitehall' and key economic and producer interests (2003: 165). As such, Moran stresses the extent of material change, while underplaying the continuity of core ideas and values. The institutionalist lens adopted by Moran leads him to reach a transformationalist conclusion that equates the internal reforms of the last three decades, in response to the external pressures of globalisation and Europeanisation, with the abandonment of the ideas and values of the club system. This is despite the fact that Moran does allude to elements

of continuity in the era of high modernism and hyper-innovation; the key commonality being the continued ability of elites to insulate themselves from the demands of majoritarian democracy in the 'new' regulatory state.

The key advantage of the ideational framework employed here is that it allows us to reconcile the huge changes in the internal and external environment of the British state in the last 40 years with the persistent elitism of power relations in UK regulation. By using the BPT as an organising perspective, it is possible to examine how the traditional concept of limited liberal representation and the conservative notion of responsibility have continued to shape the trajectory of the British regulatory state in the late modern era. As such, it is possible to claim that the club system has been reconstituted rather than 'destroyed' (Moran: 34), while also acknowledging the growing set of contemporary pressures and challenges that seem to heighten with every coming year. The pressures of globalisation, Europeanisation and rise of more critical, less deferential citizenry that really began to take hold in the 1970s remain major strategic and everyday challenges for the British state today. In most respects, the forces and impact of these pressures have become infinitely more complex and seemingly intractable in the interim period.

The challenges of regulation—and the nation-state more generally—are increasingly diffuse, transboundary and contingent on a range of interdependent variables. On a meta-level, a whole range of 'grand challenges' exist—climate change, resource scarcity, large-scale involuntary migration, cyberattacks and terrorism—that the regulatory state seems ill-equipped to tackle (WEF 2015). Virtually all of these risks are both transboundary and interdependent, interacting with each other and natural disasters (such as earthquakes, floods and tsunamis) in complex and unpredictable ways. Addressing this nexus of risks presents new and evolving challenges to governments, for which the regulatory state in its current (sectoral) guise is not designed to meet. The continual production of new risks is likely to maintain the cycle of crisis and hyper-innovation, which lies at the heart of Moran's (2003) conceptualisation of the British regulatory state.

Conclusion

In this context, it is not surprising that regulation has become an arena of high politics. For some scholars, the aftermath of the financial crisis constitutes a 'public administration moment', creating a space for a new agenda to be put forward for the reform of financial regulation (Khademian 2009)

and the regulatory state more generally (Lodge and Wegrich 2012). Although debate abounds on the scope and purpose of regulation, there is a paucity of analysis that seeks to identify some coherent themes across different sectors that underlie this discussion in order to evaluate the implications for the British regulatory state. In response, it is argued here that the litany of scandals to emerge in recent years reveals two themes central to the debate on the crisis of regulation: first is the continued relevance of the self-regulatory ideal in the UK despite the apparent inability of many institutions in Britain to effectively govern and risk manage their own activities; the second is the imperative on the British state to explicitly formalise the traditional approach to regulation in response to exogenous challenges.

These two key themes point to the perplexing puzzle of contemporary regulation in the UK. The demise of the traditional 'club model' of regulation was premised on the growing politicisation of regulation and the increasing formalisation and codification of its practice. These processes strike at the heart of the British regulatory tradition, which is characterised by informal relationships, tacit conventions, and cooperation and conciliation between insiders. However, at the same time, many of the norms of the British regulatory tradition, such as the privileging of elite expert advice, the role of negotiation and bargaining, administrative discretion, proportionality, remain intact; only now in explicit rather than implicit form. The rest of this book explores different domains of social and economic life in order to unpick this nuanced process of change and continuity in UK regulation.

Notes

1. For example, see: Ellis v. Home Office [1953] 2 QB 135; Duncan v. Cammell Laird & Co. [1942] AC 642; and Conway v. Rimmer [1968] AC 910.
2. See Allnutt v. Inglis, 104 Eng. Rep. 206 (K.B. 1810); Magistrates of Kircaldy v. Greig, 8 D. 1247 (Scot. 1846).
3. See the Plowden Report 1961, the Fulton Report 1968 and the 1970 White Paper, The Reorganization of Central Government.
4. See Ofcom's 'Submission to the Leveson Inquiry on the future of press regulation: A response to Lord Justice Leveson's request' April 2012 for a discussion of the different models of self-regulation, co-regulation and statutory regulation.

Bibliography

Ashby, E., & Anderson, M. (1981). The Politics of Clean Air. Oxford: Clarendon Press.

Axelrad, L., & Kagan, R. A. (2000). *Regulatory encounters: Multinational corporations and American adversarial legalism*. University of California Press.

Baggott, R. (1989). Regulatory reform in Britain: The changing face of self-regulation. *Public Administration, 67*(4), 435–454.

Baldwin, R., Scott, C., & Hood, C. (1998). *A reader on regulation*. Oxford University Press.

Bartle, I., & Marchant, J. (2003). The UK model of utility regulation. *CRI Proceedings,* 31.

Bartle, I., Mueller, M., Sturm, R., & Wilks, S. (2002). *The regulatory state: Britain and Germany compared*. London: Anglo-German Foundation for the Study of Industrial Society.

Bartle, I., & Vass, P. (2005). *Self-regulation and the regulatory state: A survey of policy and practice*. Centre for the Study of Regulated Industries, University of Bath School of Management.

Beck, U. (1992). *Risk society: Towards a new modernity*. Sage.

Beck, U., Giddens, A., & Lash, S. (1994). *Reflexive modernisation*. Polity.

Beer, S. H. (1982). *Britain against itself: The political contradictions of collectivism*. Faber & Faber.

Bevir, M., & Rhodes, R. A. (1999). Studying British government: reconstructing the research agenda. The British Journal of Politics & International Relations, *1*(2), 215–239.

Bevir, M., & Rhodes, R. A. W. (2003). *Interpreting British governance*. Psychology Press.

Black, D. (1976). *The behavior of law*. Bingley: Emerald.

Black, J. (1996). Constitutionalising self-regulation. *The Modern Law Review, 59*(1), 24–55.

Black, J. (1997). *Rules and regulators*. Oxford: Clarendon.

Black, J. (2000). Proceduralizing regulation: Part I. *Oxford Journal of Legal Studies, 20*(4), 597–614.

Black, J. (2001). "Managing Discretion." ARLC Conference Papers. Penalties: Policy, Principles and Practice in Government Regulation. Available at: http://w.lse.ac.uk/collections/law/staff%20publications%20full%20text/black/alrc%20managing%20discretion.pdf

Blass, E. (2010). The Failure of Professional Self-Regulation: The example of the UK Veterinary Profession. *Journal of Business Systems, Governance and Ethics, 5*(4), 1.

Braithwaite, J. (2008). *Regulatory capitalism: How it works, ideas for making it work better*. Edward Elgar Publishing.

Bulmer, S., Dolowitz, D., Humphreys, P., & Padgett, S. (2007). *Policy transfer in European Union governance: Regulating the utilities*. Routledge.

Burnham, P. (2006). Restructuring state–economy relations. In Fairbrother, P. and Rainnie, A. (Eds.) *Globalisation, State and Labour*, Abingdon: Routledge.

Collini, S., Winch, D., & Burrow, J. (1983). *That noble science of politics: A study in nineteenth-century intellectual history*. CUP Archive.

Cooke, R. (1994). "Has Administrative Law gone too far?". In *International Bar Association 25th Bi-annual Conference*, Melbourne, October 1994.

Craig, P. P. (1991). Constitutions, property and regulation. *Public Law, 4*, 538–554.

Cranston, R. (1979). Regulating Business Law and Consumer Agencies. London: Macmillan.

Crozier, M., Huntington, S. P., Watanuki, J., & Commission, T. (1975). *Crisis of democracy: Report on the governability of democracies to the trilateral commission*. New York University Press.

Diamond, P. (2013) *Governing Britain: Power, politics and the prime minister*. I.B. Tauris.

Dyson, K. (1980). *The state in Western Europe. A study of an idea and institution*. Oxford: Martin Robertson.

Dyson, K. (2002). The nature and relevance of state policy for techno-industrial innovation. In Hilpert, U. (Ed.) *State Policies and Techno-Industrial Innovation*, London: Routledge.

Eberlein, B. (2001). To regulate or not to regulate electricity: Explaining the German Sonderweg in the EU context. *Journal of Network Industries, 2*, 353–384.

Edlin, D. E. (2004). From ambiguity to legality: The future of English judicial review. *American Journal of Comparative Law, 52*, 383.

Elgie, R. (2003). Governance traditions and narratives of public sector reform in contemporary France. *Public Administration, 81*(1), 141–162.

Elgie, R. (2006). Why do governments delegate authority to quasi-autonomous agencies? The case of independent administrative authorities in France. *Governance, 19*(2), 207–227.

Ernst, J. (1994). *Whose utility?: The social impact of public utility privatization and regulation in Britain*. Buckingham: Open University Press.

Finer, S. E. (1975). *Adversary politics and electoral reform*. London: Anthony Wigram.

Evans, M. (2003). *Constitution-making and the Labour Party*. Basingstoke: Palgrave Macmillan.

Fitzpatrick, D., & Diamond, P. (2015). Responding to crisis: Whitehall and the politics of austerity. In M. Paxton, E. Kolpinskaya, & J. Jonasova (Eds.), *Politics in crisis?*. Newcastle upon Tyne: Cambridge Scholars.

Gamble, A. (1990). Theories of British politics. *Political Studies, 38*(3), 404–420.
Gilardi, F. (2005). The institutional foundations of regulatory capitalism: The diffusion of independent regulatory agencies in Western Europe. *The Annals of the American Academy of Political and Social Science, 598*(1), 84–101.
Gill, P. (2002). Policing and regulation: What is the difference? *Social & Legal Studies, 11*(4), 523–546.
Graham, C., & Prosser, T. (1991). *Privatizing public enterprises: Constitutions, the state and regulation in comparative perspective*. Oxford: Clarendon
Guasch, J. L., & Spiller, P. T. (1999). *Managing the regulatory process: Design, concepts, issues, and the Latin America and Caribbean story*. World Bank Publications.
Gunningham, N., Kagan, R. A., & Thornton, D. (2003). *Shades of green: Business, regulation, and environment*. Stanford University Press.
Hailsham, Q. H. B. (1976). *Elective dictatorship*. British Broadcasting Corporation.
Halpern, D., & Cockayne, A. (2004). *Trust, engagement and legitimacy in public institutions. Summary of interim analytical report*. Cabinet Office.
Hantke-Domas, M. (2003). The public interest theory of regulation: Non-existence or misinterpretation? *European Journal of Law and Economics, 15*(2), 165–194.
Hawkins, K. (1984). *Environment and enforcement: Regulation and the social definition of pollution*. Oxford: Clarendon.
Hawkins, K. (2002). Law as last resort: Prosecution decision-making in a regulatory agency. Oxford: Oxford University Press.
Hawkins, K. (2013). Enforcing regulation: Robert Kagan's contribution—And some questions. *Law & Social Inquiry, 38*(4), 950–972.
Hay, C. (1996). Re-stating social and political change. Maidenhead: Open Univ Press.
Hay, C. (1999). The political economy of new Labour: labouring under false pretences?. Manchester: Manchester University Press.
Hay, C., & Rosamond, B. (2002). Globalization, European integration and the discursive construction of economic imperatives. *Journal of European Public Policy, 9*(2), 147–167.
Hills, J. (1986). *Deregulating telecoms: Competition and control in the United States, Japan, and Britain*. Quorum Books.
Hobsbawm, E., & Ranger, T. (2012). *The invention of tradition*. Cambridge University Press.
Hogwood, B. (1983). The instruments of desire: How British governments attempt to regulate and influence industry. *Public Administration Bulletin, 42*, 5–25.
Holliday, I. (2000). Is the British state hollowing out? *The Political Quarterly, 71*(2), 167–176.

Hood, C., James, O., Scott, C., Jones, G. W., & Travers, T. (1999). *Regulation inside government: Waste watchers, quality police, and sleaze-busters.* Oxford University Press.

Humphreys, P., & Simpson, S. (2005). *Globalisation, convergence and European telecommunications regulation*. Edward Elgar Publishing.

Hutter, B. (1997). *Compliance: Regulation and enforcement.* Oxford: Clarendon Press.

Hutter, B. M. (1988). *The Reasonable Arm of the Law?: The law enforcement procedures of environmental health officers.* Oxford: Clarendon Press.

Hutter, B. M., & Manning, P. (1990). The contexts of regulation: The impact upon health and safety inspectorates in Britain. *Law & Policy, 12*(2), 103–136.

Johal, S., Moran, M., & Williams, K. (2012). The future has been postponed: The Great Financial Crisis and British politics. *British Politics, 7*(1), 69–81.

Jordan, G., & Richardson, J. (1982). The British policy style or the logic of negotiation? In J. Richardson (Ed.), *Policy Styles in Western Europe,* 80–110. London: Allen and Unwin.

Jordana, J., & Levi-Faur, D. (2004a). The politics of regulation in the age of governance. In Jordana, J. and Levi-Faur, D. (Eds.), *The politics of regulation: Institutions and regulatory reforms for the age of governance* (pp. 1–28). London: Edwards Elgar.

Jordana, J., & Levi-Faur, D. (2004b). *The politics of regulation: Institutions and regulatory reforms for the age of governance*. London: Edward Elgar Publishing.

Jorion, B. (1998). Les autorites administratives independantes, In: Petit, Jacques (Hrsg.), Droit administratif et administration, Paris 1998, S. 41 ff.

Kagan, R. (1978). How much do national styles of law matter?. In Kagan, R. and Axelrad, L. (Eds.) *Regulatory encounters: Multinational corporations and American adversarial legalism*. Berkeley: University of California Press (pp. 1–32).

Kagan, R. A. (2000). How much do national styles of law matter?. In Kagan, R. and Axelrad, L. (Eds.) *Regulatory encounters: Multinational corporations and American adversarial legalism*. Berkeley: University of California Press (pp. 1–32).

Kagan, R. A., & Scholz, J. T. (1984). The 'criminology of the corporation' and regulatory enforcement strategies. In K. Hawkins & J. M. Thomas (Eds.), *Enforcing regulation*. Boston, MA: Kluwer-Nijhoff.

Kavanagh, D. (2003). British political science in the inter-war years: the emergence of the founding fathers. *The British Journal of Politics & International Relations, 5*(4), 594–613.

Kerr, P., & Kettell, S. (2006). In defence of British politics: The past, present and future of the discipline. *British Politics, 1*(1), 3–25.

Khademian, A. M. (2009). A public administration moment: Forging an agenda for financial regulatory reform. *Public Administration Review, 69*(4), 595–602.

King, A. (1975). Overload: Problems of governing in the 1970s. *Political Studies, 23*(2–3), 284–296.
King, A. S. (1976). *Why is Britain becoming harder to govern?*. British Broadcasting Corporation.
Kolko, G. (1967). *The triumph of conservatism: A reinterpretation of American history, 1900–1918*. Quadrangle Books.
Krasner, S. D. (1999). *Sovereignty: Organized hypocrisy*. Princeton, NJ: Princeton University Press.
Lange, B. (1998). Understanding regulatory law: Empirical versus systems-theoretical approaches? *Oxford Journal of Legal Studies, 18*(3), 449–471.
Lau, R. R., & Sears, D. O. (1986). Social cognition and political cognition: The past, the present, and the future. In Lau, R. R., & Sears, D. O. (Eds.) *Political Cognition,* Hillsdale: Erlbaum, 347–366.
Laws, J. (1995). Law and democracy. *Public Law,* (1), 72–93.
Levi-Faur, D. (2005). The global diffusion of regulatory capitalism. *The Annals of the American Academy of Political and Social Science, 598*(1), 12–32.
Levy, B., & Spiller, P. T. (1994). Institutional Foundations of Regulatory Commitment: A comparative analysis of telecommunications regulation. *The Journal of Law, Economics and Organizations, 10*, 201.
Lipsky, M. (1980). *Street-level bureaucracy: Dilemmas of the individual in public services*. New York: Russell Sage Foundation.
Littlechild, S. (2012). The process of negotiating settlements at FERC. *Energy Policy, 50*, 174–191.
Lodge, M. (2002). *On different tracks: Designing railway regulation in Britain and Germany*. Greenwood Publishing Group.
Lodge, M. (2014). The British Regulatory State under the coalition government: Volatile stability continued. *The Political Quarterly, 85*(2), 143–147.
Lodge, M., & Mennicken, A. (2015). Regulation in crisis. *Risk and Regulation, 28*, 4–8.
Lodge, M., & Wegrich, K. (2012). *The Regulatory State in Crisis: A public administration moment?*. London School of Economics and Political Science, Department of Government and Centre for Analysis of Risk and Regulation, disponible en: http://goo. gl C, 4078.
Marinetto, M. (2003). Governing beyond the Centre: A critique of the Anglo-Governance School. *Political studies, 51*(3), 592–608.
Marquand, D. (1993). The twilight of the British state? Henry Dubb versus sceptred awe. *The Political Quarterly, 64*(2), 210–221.
Marsh, D., Richards, D., & Smith, M. (2003). Unequal plurality: Towards an asymmetric power model of British politics. *Government and Opposition, 38*(3), 306–332.
Marsh, D., Richards, D. D., & Smith, M. J. (2001). *Changing patterns of governance in the United Kingdom: Reinventing Whitehall?*. Palgrave.

Marsh, D. and Tant, T. (1989). "There is no alternative: Mrs Thatcher and the British Political Tradition." Essex Papers in Politics and Government 69.

McChesney, F. S. (2001). Ever the twain shall meet. [Review of *Corruption and Government: Causes, Consequences, and Reform by* Susan Rose-Ackerman] *Michigan Law Review* Vol. 99, No. 6, 2001. Survey of Books Relating to the Law (May, 2001), pp. 1348–1369.

McCormick, J. (2013). *British politics and the environment*. Routledge.

Meidinger, E. (1987). Regulatory culture: A theoretical outline*. *Law & Policy, 9*(4), 355–386.

Meyers, M. K., & Vorsanger, S. (2007). Street-level bureaucrats and the implementation of public policy. In Pierre, J. and Peters, B.G. (Eds.) *The SAGE Handbook of Public Administration*. London: Sage (pp. 153–163).

Moran, M. (2003). *The British Regulatory State: High modernism and hyper-innovation: High modernism and hyper-innovation*. Oxford University Press.

Ogus, A. I. (2004). *Regulation: Legal form and economic theory*. Bloomsbury Publishing.

Parris, H. (1965). Government and the Railways in Nineteenth-Century Britain. London: Routledge & Kegan Paul.

Paulus, I. (1974). The Search for Pure Food: A Sociology of Legislation in Britain. London: Martin Robertson.

Pierre, J., & Peters, G. B. (2000). Governance, politics and the state. Basingstoke: Macmillan.

Posner, R. A. (1974). *Theories of economic regulation*. Cambridge, MA: National Bureau of Economic Research.

Power, M. (1999). *The audit society: Rituals of verification*. Oxford: Oxford University Press.

Power, M. (2005). The theory of the audit explosion. *The Oxford handbook of public management*. Oxford: Oxford University Press, (pp. 327–344).

Power, M. (2008). Organized uncertainty: Designing a world of risk management. *OUP Catalogue*. Oxford: Oxford University Press.

Power Inquiry. (2006). *Power to the people: The report of Power: An independent inquiry into Britain's democracy: The centenary project of the Joseph Rowntree Charitable Trust and the Joseph Rowntree Reform Trust*. Power Inquiry.

Prosser, T. (1999). Theorising utility regulation. *The Modern Law Review, 62*(2), 196–217.

Prosser, T. (2000). Public service law: Privatization's unexpected offspring. *Law and Contemporary Problems, 63*(4), 63–82.

Prosser, T. (2001). Public service law: Privatization's unexpected offspring. *Law & Comtemporary Problems*, 63, 63–82.

Prosser, T. (2010). *The regulatory enterprise: Government, regulation, and legitimacy*. Oxford University Press.

Reiss Jr, A. J. (1983). The policing of organizational life. In *Control in the police organization*, Mass: MIT Press, (pp. 78–97).

Rhodes, R. A. W. (2011). *Everyday life in British government*. Oxford University Press.
Rhodes, R. A., & Dunleavy, P. (1995). *Prime minister, cabinet and core executive*. Palgrave Macmillan; St. Martin's Press.
Rhodes, R. A. W. (1997). *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*. Buckingham. Open University Press.
Rhodes, G. (1981). Inspectorates in British Governance: Law Enforcement and Standards of Efficiency. London: Allen and Unwin.
Richardson, J. (2013). *Policy styles in Western Europe (Routledge Revivals)*. Routledge.
Richardson, G., Ogus, A., & Burrows, P. (1982). Policing pollution: A study of regulation and enforcement. In *Oxford socio-legal studies: Show all parts in this series*. Oxford: Clarendon Press.
Richards, D., & Smith, M. J. (2002).*Governance and public policy in the United Kingdom*. Oxford: Oxford University Press.
Robens, A. (1972). Safety and Health at Work: Report of the Committee, 1970–72, Chairman Lord Roberts.
Rossi, J. (2001). Bargaining in the shadow of administrative procedure: The public interest in rulemaking settlement. *Duke Law Journal*, *51*, 1015–1058.
Rossi, J. (2005). *Regulatory bargaining and public law*. Cambridge University Press.
Sabatier, P. A. (1988). An advocacy coalition framework of policy change and the role of policy-oriented learning therein. *Policy sciences, 21*(2–3), 129–168.
Schmidt, V. A., & Thatcher, M. (2013). *Resilient liberalism in Europe's political economy*. Cambridge University Press.
Schon, D., & Rein, M. (1994). *Frame reflection: Resolving intractable policy issues*. New York: Basic Books.
Shaw, E. (2012). New Labour's Faustian Pact&quest. *British Politics, 7*(3), 224–249.
Shils, E. (2006). *Tradition*. University of Chicago Press.
Spiller, P. T., & Vogelsang, I. (1997). The institutional foundations of regulatory commitment in the UK: The case of telecommunications. *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft, 153*(4), 607–629.
Stigler, G. J. (1971). The theory of economic regulation. *The Bell Journal of Economics and Management Science, 2*(1), 3–21.
Stigler, G. J. (1975). *The citizen and the state: Essays on regulation*. Chicago: University of Chicago Press.
Tant, A. (1993a). *British government: The triumph of elitism: A study of the British political tradition and its major challenges*. Dartmouth.

Tant, A. P. (1993b). *British government: The triumph of elitism: A study of the British political tradition and its major challenges*. Dartmouth Publishing Company.

Terrill, R. (1973). *RH Tawney and his times: Socialism as fellowship*. Harvard University Press.

Thatcher, M. (2002). Delegation to independent regulatory agencies: Pressures, functions and contextual mediation. *West European Politics, 25*(1), 125–147.

Thatcher, M. (2007). Regulatory agencies, the state and markets: A Franco-British comparison. *Journal of European Public Policy, 14*(7), 1028–1047.

Thomas, M. (1948). The Early Factory Legislation: a Study in Legislative and Administrative Evolution. Leigh-on-Sea: Thames Bank Publishing.

Tombs, S. (2015). *Social protection after the crisis: Regulation without enforcement*. Policy Press.

Van Waarden, F. (1995). Persistence of national policy styles: A study of their institutional foundations. In *Convergence or diversity*, Brookfield, US: Aldershot (pp. 333–372).

Vogel, D. (1983). Cooperative regulation-environmental-protection in Great-Britain. *Public Interest, 72*, 88–106.

Vogel, D. (1986). National styles of regulation: Environmental policy in Great Britain and the United States. Ithaca, NY: Cornell University Press.

Vogel, S. K. (1996). *Freer markets, more rules: Regulatory reform in advanced industrial countries*. Cornell University Press.

Vogel, D. (2003a). The hare and the tortoise revisited: The new politics of consumer and environmental regulation in Europe. *British Journal of Political Science, 33*(4), 557–580.

Vogel, D. (2003b). *National styles of business regulation: A case study of environmental protection*. Beard Books.

Walshe, K. (2002). The rise of regulation in the NHS. *British Medical Journal, 324*(7343), 967.

Weatherley, R., & Lipsky, M. (1977). Street-level bureaucrats and institutional innovation: Implementing special-education reform. *Harvard Educational Review, 47*(2), 171–197.

Weber, M. (1978). *Economy and society: An outline of interpretive sociology*. University of California Press.

Wilks, S. (1999). *In the public interest: Competition policy and the Monopolies and Mergers Commission*. Manchester University Press.

Woolf, L. (1995). Droit Public-English style. *Public Law, 57*, 56–71.

World Economic Forum. (2015). Global Risks 2015 (10th Ed.) Geneva: WEF.

Wright, T. (2013). *British politics: A very short introduction*. Oxford University Press.

PART II

Pressures for Change

CHAPTER 4

The Neoliberal Tradition: Privatisation and Re-regulation

Introduction

The 1980s was a period of dramatic change for the governance of British industry. The decade witnessed the privatisation of telecommunications (1984), gas (1986), electricity and water (1989). This transfer of state assets to the private sector was followed by the establishment of regulatory regimes for the newly privatised public utilities. This programme of privatisation was expanded in the 1990s under the Major government and consolidated by the New Labour administration after their election to power in 1997, following 18 years of Conservative government.

Privatisation has been described as a 'revolution' in terms of its transformational impact on the British polity, from varied economic (Bolick 1995), constitutional (Graham and Prosser 1991), administrative (Dunsire 1995), political (Moran 2003) and cultural (Yeatman 1987) perspectives. For Moran (2003: 95), this 'epoch of hyper-innovation' was catalysed by the convergence of two overlapping political and economic crises: the perceived crisis of the Keynesian welfare state in the late 1970s, of which the failing nationalised industries were seem to be emblematic; and a deeper, more subtle and less articulated crisis of the traditional mode of regulating private enterprise, that is British regulatory tradition. In that sense, the inefficiencies and poor customer service of nationalised industries can be interpreted not only as the result of public ownership and lack of competition, but also due to the absence of

D. Fitzpatrick, *The Politics of Regulation in the UK*,
DOI 10.1057/978-1-137-46199-5_4

a developed system of public service law that fostered unaccountable and impervious governance practices in the state sector (Graham and Prosser 1991). Moran implies that privatisation represented the repudiation of both nationalisation as a mode of economic organisation, and the value and norms of the British regulatory tradition. In contrast, the core claim of this chapter is that privatisation and the neoliberal ideas that underpinned it were largely assimilated into the prevailing 'club world' of the dominant political and regulatory traditions in Britain.

In many accounts of state transformation, privatisation and deregulation are seen as the inexorable outcomes of the rise of neoliberalism, and more latterly the sweeping forces of economic globalisation (Levi-Faur 2005). From this perspective, neoliberalism is depicted as a reaction to the social democratic hegemony of the post-war period, advocating freer markets and less government: 'The criterion of its success is … the separation of markets from politics' (Levi-Faur 2005: 28). However, did the market-orientated ideas that underpinned privatisation constituted a coherent 'neoliberal tradition'? In answering this question, we will examine the ways in which neoliberalism challenged the dominance of the British regulatory and political tradition by contesting its ideational, institutional and procedural basis from an alternative conception of democracy. We explore how the policy of privatisation was framed by a competing neoliberal tradition to the prevailing political and regulatory traditions in Britain and some of the contradictions that transpire.

Employing a critical problematising approach, I analyse the challenge to the British regulatory tradition posed by the privatisation and re-regulation of public utilities. It should be noted from the outset that such challenges to the dominant tradition have been made within the prevailing context of the institutions and processes that were underpinned by the BPT. This elitist conception of democracy continues to enjoy the tacit support of key actors in central government. Thus, although ideas underlying privatisation and deregulation that compete with or challenge the British regulatory tradition have affected policy outcomes, the options for change are developed in a strategically selective environment that privileges those choices that 'fit' with the prevailing regulatory style, institutions and practices. As one official put it, employing this analytical lens of tradition helps us better understand how: 'certain assumptions, consensus values and norms over time have shaped the [regulatory] approach … as the golden threads that run through' the evolution of public utility regulation (Director Ofcom, interview).

Using data gathered from elite interviews and primary documents, I interrogate the process of contestation that the British regulatory tradition has undergone post-privatisation. The objective here is to examine the influence of the BPT and the prevailing ideational and institutional environment on the views of political actors, the options considered and the eventual regulatory outcomes. The intellectual and institutional challenges of an alternative neoliberal tradition to the manifestations of 'club regulation', in the broader context of a dominant BPT, are unpacked and examined. In particular, I critically analyse the putative attempt to subject the privatised utilities to an econometric, non-discretionary regulation regime that challenged the traditional capacity of the state to intervene in the operation of the public utilities and therefore the underlying notion that the 'government knows best'. The Report on the Regulation of British Telecommunications Profitability (Littlechild 1983) is afforded particular attention given its decisive impact on nature of the regulatory framework for utilities and network industries, in the UK and elsewhere. The content and themes of the 'Littlechild Report' are compared with the subsequent privatising acts (the Telecommunications Act 1984, the Electricity Act 1989, and the Water Act 1989), as well as with the views of other contemporary actors through the analysis of the evidence derived from personal interviews with ministers, civil servants and regulators.

The privatisation of public utilities was the result of a process of continual contestation between the British regulatory tradition, which is itself shaped by the dominant political tradition, and a neoliberal tradition that advocated a new 'British model' based on a non-discretionary regulatory regime. Privatisation and re-regulation developed in a strategically selective environment that privileged the prevailing ideational, institutional and discursive norms associated with the dominant regulatory and political traditions. Thus, although the challenge of neoliberalism undoubtedly led to changes in the regulation of public utilities, in many ways privatisation and the re-regulation (oppose to deregulation) of public utilities remained consistent with the British regulatory tradition. Privatisation, however, has had unintended consequences: far from depoliticising the regulation of public utilities through the establishment of a non-discretionary regime, privatisation highlighted politically contentious issues such as windfall profits, executive pay, the problem of regulatory accountability and the social and environmental obligations of the incumbent companies. It is important therefore to analyse the 'tension between moments in time in which policy decisions are being made on essentially ideological basis …

and then the way that the business of usual regulation challenges that or sits slightly uneasily with the assumptions that were made' (Director Ofcom, interview).

Privatisation and the Neoliberal Tradition

A huge body of literature on the privatisation and regulation of public utilities has already been amassed. Within this literature, 'privatisation' is usually understood as the transfer of public enterprises to private ownership, involving the sale of at least 50 % of its shares to private shareholders. In this sense, privatisation denotes denationalisation; that is the transfer of nationalised industries back to the private sector. Although its exact etymology is contested (Bel 2006), the word 'privatisation' is thought to have only entered the political lexicon in Britain after the plans for the privatisation of British Telecom (BT) were already underway. Abromeit (1988: 72) comments that it was only 'after the event' that the Conservative government made a concerted attempt to 'equip the *de facto* policy … with a more or less consistent philosophy'. David Howell,[1] who had become familiar with the concept while investigating ways to reduce the size of public sector for the 1969 pamphlet 'A New Style of Government', suggested the use of privatisation over denationalisation, which 'did not sound positive enough' (Lawson 1992: 198). Although it has been increasingly used to refer to a wide range of measures that entail a reduced role for the state in the direct provision of goods and services (such as public–private partnerships and contracting out in the NHS), privatisation became synonymous with the sale of state assets, especially public utilities, in the 1980s and 1990s (Parker 2004a).

For most of the twentieth century, the governance of public utilities in Britain was executed through public corporations. By 1979, nationalised industries accounted for 1 % of GDP, 14 % of capital investment and 8 % of employment (Parker 2004b). The relative poor performance of the nationalised sector (where the rate of return on capital hovered between 0 and 2 %), in the wider context of poor industrial relations and declining faith in Keynesianism, led to growing criticism of state-owned public utilities in the 1970s (Rutter et al. 2012). The underlying principles of privatisation had been discussed in academia (Drucker 1969) and Conservative Party forums, such as the free market Selsdon Group, since the point of nationalisation (Abromeit 1988). The pressures for radical change created by the 'crisis' of the Keynesian welfare state opened up a

political space for the New Right to move the idea of privatisation onto the policy agenda. Such discontent had already precipitated the divestment of a number of state assets: in 1976, the Heath government sold off two separate state management districts (a brewery and public houses) and the two publicly owned travel agents. Even a Labour government sold shares in British Petroleum (BP) in 1977 to finance public spending; a year after the devaluation of sterling forced the government to request a record $3.9 billion loan from the IMF. However, these privatisations were relatively minor, involving industries in competitive sectors of the economy, where there was a degree of similitude with the commercial operations of private companies.

The 1979 Conservative Party manifesto continued in this vein, only proposing relatively small sale of shares in the National Freight Corporation, the shipbuilding industries and the National Enterprise Board's holdings, together with a 'complete review' of the British National Oil Corporation's activities and a relaxation of bus licensing (Graham and Prosser 1991: 20). These were piecemeal and isolated reforms and did not constitute a coherent policy programme. Subsequent privatisation of firms such as British Aerospace (1981), Britoil (in 1982) and Cable and Wireless (conducted in three stages between 1981 and 1985) in the first term of the Thatcher Government did not pose major regulatory problems because of their relative market power and contestability (Vickers and Yarrow 1988: 156).

The privatisation of the nationalised public utilities did not figure at all in the 1979 election manifesto, which was 'reassuringly moderate in tone and content' according to former Cabinet Minister Jim Prior (1986: 112). Lord Jenkin (interview) explained that the Prime Minister and Cabinet were initially 'stunned' at the idea of privatising BT. In her memoirs, Thatcher describes how such a policy seemed 'all but unthinkable' at the end of the 1970s, when 'privatisation was scarcely a gleam in the minister's eye' (Foreman-Peck 2004). There was broad cross-party consensus, up until the mid-1970s, that state ownership was inescapable in those industries that constituted natural monopolies and/or were dependent on state subsidies. Nevertheless, early small-scale privatisations were an important forerunner, not only because they demonstrated that such sales were feasible but also because they planted the idea onto the agendas of other policy networks in Whitehall (Zahariadis and Allen 1995). Even more crucial, perhaps, was the success of the 'Right to Buy' scheme, which gave council tenants the option to buy their homes at deep discount. It was a late addition to the 1979 manifesto after focus group research by the Conservative

Research Department discovered just how popular the proposal was with council tenants traditionally aligned to the Labour Party (McLean 2004).

The 1979 election witnessed a shift in attitude rather than policy regarding the nationalised industries. The leaked 'Ridley Report'[2] contained a confidential annex that proposed a radically hard line policy in relation to the nationalised industries (Cardona 1978). Nevertheless, the Ridley Report asserted that denationalisation of what he called 'true utilities' was 'low in the list of priorities', as 'There really is little Government can do about these industries other than get them to price their wares correctly through a rate of return policy' (The Nationalised Industries Policy Group 1977: 18–22). The focus of this firmer management approach to industrial relations, however, was on the coal and steel industries, rather than utilities such as telecoms and gas: the appointment and renewal of chairmen such as George Jefferson at BT and Denis Rooke at British Gas, both former engineers, were far from the typical 'Thatcherite mode' (Graham and Prosser 1991: 11–12). After 1979, however, any pretence that nationalised industries were qualitatively different from private enterprises was abandoned. This is evidenced by a shift in policy to a means of control which had not previously played a major part in the relationship between government and nationalised industries: the external financing limit. This provided a blunt mechanism of control on the industries' borrowing and reliance on public funds, stressing the need for profit-making to reduce borrowing by increasing the ability to finance investment from the industry's own efficiency gains (Graham and Prosser 1991: 12).

The more aggressive form of management style precluded any official representation of worker or consumer interests post-1979. The experiment with worker-directors was quickly abandoned as was the notion that the 'nationalised industries has a system of industrial relations particularly sympathetic to working class interests' (Graham and Prosser 1991: 12). The notion that competition was the most effective protection of the consumer interest diverted attention away from any special protection which the consumer councils might have been thought to provide. In an attempt to foster competition, the domain of the competition authority (then the Monopolies and Mergers Commission [MMC]) was extended to include the nationalised industries in the Competition Act 1980. The failure of these measures to increase the productivity or competitiveness of the nationalised industries facilitated the emergence of privatisation on the policy agenda. Indeed, they can be seen as part of what the Ridley Report called a 'policy of preparation' for the return of nationalised industries 'to

the private sector by stealth' rather than a 'frontal attack' (Nationalised Industries Policy Group 1977: 22). Privatisation emerged, therefore, as a policy response to a set of problems which by the end of the 1970s were perceived to characterise large swathes of the nationalised sector (Heald and Thomas 1986: 50).

Despite the inchoate nature of its first term, privatisation came to define the Conservative Party's 18 years in power. Initially, the introduction of privatisation divided Conservative opinion. For some, such as former Prime Minister Harold Macmillan (1985), privatisation was tantamount to selling the family silver, with BT and British Gas analogous to 'the two Rembrandts that were still left'. By the end of the 1980s, however, privatisation has undergone something of a rehabilitation. Peter Riddell claimed it represented 'the Jewel in the Crown of the Government's legislative programme, around which all shades of Tories can unite' (Riddell 1989: 88). The widely held assumption is that the privatisation of public utilities was a central plank of a wider ideological project—often referred to as Thatcherism—to empower the market and 'roll back the frontiers of the state', under the banner of new public management. The transfer of ownership from the state to the private sector in the public utilities was thus premised on the neoliberal proposition that state involvement in the economy leads to perverse results (of which the poor performance of nationalised industries in the 1970s was seen as indicative) and therefore should be minimised.

One of the main sources of inefficiency in the nationalised sector was seen to be the tendency for government to interfere in the operation of public utilities for short-term political gain. There was a strong feeling among neoliberals that the entrenchment of club regulation under nationalisation had severely damaged the competitiveness of the British economy. Lord Lang, formerly President of the Board of Trade, characterises privatisation as:

> a question of ownership and ideology. We wanted to privatise because we believed the ideology of state ownership was disproved and that privatisation would lead to greater efficiency, more diversity of control of major parts of the economy and a better deal for consumers. (President of the Board of Trade, interview)

Other actors involved in the privatisation programme also expressed the notion that deeply held beliefs on the role of state vis-à-vis the market were

the prime motivation for divestment. For instance, a former Department of Energy official commented that privatisation was based on:

> a political conviction that the state was too pervasive in the economy, and therefore that state ownership was not the most desirable form of organisation. A conviction that state enterprises were not as efficient as they should be and that privatising them would bring to that sector the disciplines of the capital market. That was the essential philosophy. (Under-Secretary, Department of Energy, interview)

It was held therefore that public utilities would yield greater gains in efficiency in the private sector through increased competition (although, theoretically, the introduction of competition and public ownership is not mutually exclusive). Privatisation in this sense is derived from the neoliberal conception of the individual and society. Neoliberalism is built on a rational-choice ontological foundation; that is, it assumes every individual is a rational, self-interested calculator of his or her own utility. Society is seen as having no role in forming such individual preferences, encapsulated by Thatcher's famous line that 'There is no such thing as society' (Keay 1987: 9). Such a view places neither little value on either the 'common good' (beyond the protection of property rights) nor any notion of the self being developed by such 'public activities'; because, if it were, this would require that the public preceded the private, whereas the neoliberalism assumes the opposite (Graham 1995: 127).

Neoliberalism involves a cultural and behavioural shift from hierarchy to individualism and is constructed against the image of the traditional Weberian public bureaucracy, as its symbolic *other*. At the heart of neoliberalism is 'a basic libertarian stress on the primacy of individuality which is believed to be optimized in a society where political power is dispersed and the economic structure of which rests on a free competitive market' (Greenleaf 1983a: 155). The neoliberal tradition, therefore, represented a reaction or a counter-revolution against 'the accumulated collectivism of the age' (Greenleaf 1983a: 154). Whereas traditional view of public administration in Britain emphasised the values of integrity, neutrality and elitism, neoliberalism, and NPM as its practical manifestation, was driven by the values of the 'three E's': economy, efficiency and effectiveness (Pyper 1995: 56–57). For some authors (Bevir and Rhodes 2003), these ideas, values and norms coalesced to represent the rise of a 'neoliberal tradition', which included an alternative vision of regulation (Prosser 2010).

Although the ascendancy of commercial over social objectives can be seen as an evolving feature of the organisation and management of public utilities in Britain during the post-war period, the privatisation of electricity and water (given their key essential life-sustaining properties) at the end of the 1980s is seen as the apotheosis of this commodification. Bevir and Rhodes (2006: 65–66) are right to claim that the rise of neoliberalism was the result of a change in attitude towards the government and the state, rather than an economic *fait accompli*. The privatisation of public utilities represented a commercialisation and commodification of 'public goods' (see Ernst 1994) and a contractualisation of the relationship between citizens and public services (see Yeatman 1996).

The ideas of neoliberalism, of course, were not particularly novel. As Bevir and Rhodes (2006: 67) note, 'anti-bureaucratic sentiments are as old as bureaucracy'. What gave neoliberalism its rhetorical power was the ideational and material context it sought to counter-pose. In the context of a less deferential climate, the notion of 'government overload' (King 1975, 1976; Crozier et al. 1975) and public choice accounts of bureaucracy provided the neoliberals in the Conservative Party with a political discourse that challenged the key nostrums of the post-war Keynesian welfare state, such as active government, the mixed economy and demand management. In the neoliberal tradition, 'the job of government was to squeeze inflation out of the system and leave matters such as growth, employment and productivity to the natural vigour of the market' (Heywood 1997: 172). As Yeatman (1996: 291) observes:

> liberalism has always derived its power … by counter-posing the integrity of the individual rational choice against some form of paternalism which denies integrity to the individual. Currently, this binary appears 'either as the paternalistic bureaucratic state, or governance as a cascading series of contracts.'

Rhetorically, the ascendency of the neoliberal tradition represented a swing in Greenleaf's (1983a) pendulum from collectivism back to libertarianism. The avowed anti-statism of the Conservative governments of the 1980s reinflected a commitment to dispense with top-down, hierarchical governance and a promise to reassert individualist liberal values in their place. In the context of public utilities, this was depicted as a shift from the command and control of nationalisation to competitive markets. However, the empirical reality of both these paradigms has been overstated. The extent of planning and direct state regulation of the economy

in the post-war period was piecemeal and episodic. Indeed, the criticism of political interference in the operation of nationalised industries was based on the accusation of opportunism and expediency. Command and control had never been the dominant approach. The nature of competition, said to be released by privatisation, moreover, was heavily reliant on state regulation to create and mimic anything close to conditions of a free market. The governance of both nationalised and privatised utilities was characterised by the cooperative compliance approach of the British regulatory tradition. The power of the neoliberal narrative was to construct an image of command and control regulation under the Keynesian welfare state that never really existed. In doing so, this enabled the propagation of the myth that the reforms of the 1980s and 1990s were deregulatory. In truth, it was during these two decades that the British regulatory state experienced its most rapid growth, colonising vast areas of social and economic life under the gaze of the state.

Alongside the aim of enhancing consumer choice, privatisation was also viewed as a mechanism to raise capital investment in new infrastructure (such as computerisation and digital networks in telecommunications), while removing the deficits and borrowings of nationalised industries from the public balance sheet (Parker 2009). A former PPS to the Secretary of State for Trade and Industry claimed that 'quite high in ministers' minds was raising money … that drove the way certain utilities were privatised, as monopolies for most of them. So privatisation was done in a way to maximise revenue' (Chief Executive of the Competition Commission, interview). However, a number of less overt political objectives also motivated the privatisation of the nationalised industries. Of particular concern was the political power of the nationalised industries, especially in regard to industrial relations. Although elected with a mandate to tackle the so-called 'enemy within' of trade union militancy, between 1980 and 1981 seven out of the ten days lost due to strike occurred in the public sector with disputes in nationalised industries, of which the Post Office Engineering Union (POEU) was prone, proving to be the longest and most acrimonious (Parker 2009: 78). Another key political objective of privatisation was 'to expand shareholding, especially by private individuals. The idea was that you would have a more dynamic capitalist economy if more people had a stake and a real interest in the success of business' (Director-General [DG], Energy Efficiency Office, Department of Energy, interview). The selling of shares to the public not only helped the City absorb the sales of these huge state enterprises but also had the

added advantage of popularising capitalism (Hall 1983), which was seen to offer the Conservatives distinct political gains. As one official remarked: '[Norman] Tebbit [Secretary of State for Trade and Industry between 1983 and 1985] was very, very keen on the wider public sale, but I think he was keen not because this was a way of raising the money but because of its political advantages … every share owner a Tory was the basic notion' (Civil servant, Department of Trade and Industry [DTI], interview).

The neoliberal tradition, therefore, emphasises the extent of change post-privatisation. It forwards an ideational binary opposition between neoliberalism and the perceived social democracy of the post-war period. From an interpretive perspective (Bevir and Rhodes 2003), the poor economic performance of nationalised industries can be viewed as a 'dilemma'; neoliberal ideas represented an innovation in the existing 'web of beliefs'. In this sense neoliberalism marked a direct challenge to the assumptions of the dominant political and regulatory traditions, as:

> free-market capitalism is quintessentially populist and subversive of traditions and rituals. Its scorns history, hollows out institutions and undermines hierarchies: in the market-place the customer is king and Jack's pound is as good as his master's. And so the capitalist renaissance which Thatcherites helped to instigate destroyed the moral foundations of the institutions they had used to procure it. (Marquand 1998: 243)

In contrast to earlier sales of state assets, the privatisation of public utilities between 1984 and 1996 was 'a generalized programme aimed at the dismantling of the nationalised sector' (Graham and Prosser 1991: 20). The denationalisation of BT in November 1984 was a turning point in terms of state's relationship with public utilities. Both the type (full stock market floatation) and scale of the privatisation marked a watershed in British politics, establishing privatisation as a major new phenomenon (Letwin 1988: 12). The privatisation of BT represented a discernable shift in policy: it overturned key dimensions of the post-war settlement, such as the commitment to full employment and a mixed economy, and directly challenged beliefs, built up over 40 years, about the role of government in strategic areas of the economy and about the immutability of public control of the utility industries (Ernst 1994: 69). Regulated private enterprise was now regarded as superior to nationalisation in natural monopolies, even in distribution networks where competition had be seen to be impractical (Vickers and Yarrow 1988: 156). How and, by

whom, the new privatised enterprises were to be regulated was something of an afterthought (Thatcher 1998), prompting a search for a new 'British model' of utility regulation in the early 1980s.

The Search for a New 'British Model' of Utility Regulation

In theory, there was no reason why the privatised public utilities could not be assimilated into the established regulatory regime for the rest of the private sector, which was mainly done through company law. In fact, the earlier privatisations in shipbuilding, oil exploration, aerospace and aviation had been incorporated into the prevailing wider system of business regulation in such a way (Moran 2003: 96–97). However, even the most radical neoliberal thinkers in the Conservative Party recognised that the unique characteristics of public utilities meant that regulation through company law alone was insufficient. As one DTI official explained:

> One reason is that most of the markets we are taking about will inherently never be perfectly competitive, for all sorts of reasons. You will always have oligopoly or some sorts of barriers to entry that will make it difficult for there to be a really open fully competitive market, with absolutely no constraints … there will always be a need for some form of regulation to act as a constraint on the public utilities. (Director BIS, interview)

The realisation that the peculiar qualities of privatisation, in terms of the special features of public utilities and the unique terms of the sale,[3] forced policy-makers to engage in a search for an alternative regulatory framework. The instinctive response was to extend the authority of the DG of the Office of Fair Trading (OFT) to cover the newly privatised utilities. The turn to an already established regulatory agency reveals a degree of path dependency in the decision-making process on privatisation regulation, contra to the radical neoliberal rhetoric of the Thatcher government. The DG's refusal, on the basis of a lack of resources, also highlights the naivety of ministers and officials in failing to appreciate the complexity of the regulatory task ahead. The government was left with a third possibility: to create a sector-specific regulator to ensure the promotion of competition, prevent the abuse of monopoly power and protect consumers. Did this new regulatory framework represent a neoliberal vision of regulation that marked a break with the British regulatory tradition?

The Littlechild Report (1983): A Neoliberal Vision of Regulation

In November 1982, the Department of Industry commissioned the 'Austrian School' economist Professor Stephen Littlechild, a former student of Professor Alan Walters (chief economic adviser to the Prime Minster between 1981 and 1983), to write a report setting out how to create a regulatory regime for a profitable privatised utility. The remit of the Littlechild Report was to evaluate the various regulatory instruments for the telecommunications sector,[4] in order to settle the discord amongst Whitehall departments about the best way forward. In recommending a scheme to promote competition, Littlechild drew on the US experience, as he perceived it, for lessons about what to avoid. He claimed that US style rate-of-return regulation has four major defects: it encourages regulatory 'capture'; competition is reduced due to regulation; there are poor incentives to internal efficiency; and the regulatory burden is heavy (Graham and Prosser 1991: 186).

The Littlechild Report has proved to be a watershed in the evolution of UK regulation: the proposal for an incentive-based and competition-driven regime for the privatised BT provided the model of regulation not only in telecommunications but in subsequent regulatory reforms in the other utility sectors post-privatisation (Lodge and Stern 2014). Reflective of a latent Whiggish interpretation of history, the type of regulatory regime advocated by Littlechild has come to be represented as the 'British model',[5] to be emulated not only amongst the different utility sectors in the UK but also across the advanced industrialised countries of the EU and OECD as well as developing and emerging economies of the global south (Mirrlees-Black 2014; Gassner and Pushak 2014).

The invention of this new 'British model' of regulation, devised by Littlechild, centred on two key innovations: the introduction of a price control formula (RPI-X) and the creation of independent regulatory agencies (IRAs). The RPI-X system linked permitted price increases to the retail price index (RPI), allowing efficiency gains to be shared between the regulated public utility and consumers. Littlechild claimed that the RPI-X price formula, in which a price cap is set at RPI minus an efficiency factor X on a five-year cycle, would result in an incentive to cut costs and thereby increase efficiency (Bartle et al. 2002: 15). Once applied to BT, the RPI-X form of control was adopted for the regulation of all major privatised utilities. Notably, the RPI-X formula was adopted in many Westminster style democracies, such as Australia and New Zealand, which were also

experiencing a shift towards a neoliberal tradition in the 1980s and 1990s. The impact of this neoliberal tradition on regulation, however, was not wholesale; the influence of the RPI-X formula on the US system of utility regulation, given its different political and regulatory traditions, was negligible (Littlechild 2014). At the heart of Littlechild's vision for this new British model of regulation were two key neoliberalising objectives: (i) the creation of competitive markets for public utilities and (ii) limiting the role of politics in their operation through a formalisation of relationship between government and the IRAs (Lodge and Stern 2014).

Competition-Driven Economic Regulation?

The RPI-X regime was designed to be incentive based and competition driven. It was thought that privatised companies would engage in what Hayek (1978) called a 'discovery procedure' of rivalrous competition to find out what the new utility consumers wanted and use this information to gain a competitive advantage. On this basis, the Littlechild Report constituted an attempt to subject the privatised utilities to a non-discretionary regulation regime that challenged the traditional capacity of the state to intervene in the operation of the public utilities and therefore the underlying notion that the 'government knows best'.

As one of the key architects of privatisation, the key aim of Professor Littlechild's report was to maximise the scope for the creation of a competitive market where the views of consumers would determine what happened; and where that could not be achieved, a regulator should be established to replicate, as closely as possible, what a competitive market might do. Although there were some qualifying secondary and tertiary duties to instruct the regulator to:

> take account of this or that set of customers or other groups … they weren't the real drivers of what was happening … basically to the extent that you could either create a competitive market or replicate that in some way … was the regulator's job. (Littlechild, interview)

Littlechild's vision of regulation, therefore, was an unashamedly neoliberal one; efficiency was to be driven by competition and ensuring the consumer was 'sovereign'. It was also an economistic perspective of regulation, which tried to assimilate the newly privatised sectors into the 'normal' market as far as possible (see Ernst 1994). For Littlechild and other

economists involved in the planning of regulatory regimes, the key concern was efficiency (Littlechild, interview). For Littlechild:

> the shift to private ownership would put a great weight on responding to what customers wanted and to doing it efficiently and a corresponding lower weight on responding to political pressures doing what governments and various other political influential bodies wanted. (Littlechild, interview)

In this vision, regulation was considered a second-best choice for economic organisation. The assumption was that 'in principle free markets giving us economic freedom should be preferred wherever possible' (Prosser 2010: 1). The purpose of regulation was to increase competition in the market to enhance efficiency and consumer choice, or to mimic market forces, through setting price controls or quality standards, in remaining areas of natural monopoly or market dominance (Prosser 2010: 12). The Conservative government adopted Professor Littlechild's recommendation to introduce a price control formula (RPI-X) that would limit the need for regulation to operate on the basis of discretion and value judgements.

The introduction of competition into the former monopoly industries was seen by economists as crucial to the improvements in efficiency (see Beesley and Littlechild 1989; Kay and Silbertson 1984). As Professor Littlechild states:

> I think the general perspective that efficiency had to be increased and this was a way of doing it … was pretty universally accepted even though some people … would say you can do that without privatising … and they would say you can do it with state ownership if you just get more efficient managers in and we would say … it hasn't worked so far … so basically bottom line is it doesn't. (Littlechild, interview)

Advocacy for increasing competition derived from not only dissatisfaction with the performance and productivity of the nationalised industries but also disillusion with ability of government instruments such as the MMC to implement an effective competition policy. The goal of competition is at the heart of the Littlechild Report; the promotion of competition as the core principle of public utility regulation is seen as the enduring legacy of Littlechild, not only in the UK, but also across the regulatory regimes of developed and developing nations (Lodge and Stern 2014). The central

premise of the Littlechild Report is that the 'success of any reform of regulation depends upon increasing competition' (1983: 1). He claims, in strong terms, that:

> Competition is indisputably the most effective – perhaps the only effective means – of protecting consumers against monopoly power. Regulation is essentially the means of preventing the worst excesses of monopoly; it is not a substitute for competition. It is a means of 'holding the fort' until competition comes.' (Littlechild 1983, para 4.11)

Despite this emphasis, only limited initiatives to induce competition were implemented during the privatisation of telecommunications, namely the licensing of a competing trunk supplier in the Mercury Consortium as a telecommunications operator in 1982 (Thompson 1988: 39). Under the duopoly policy, which amounted to manage competition, Mercury competed with BT as an additional long-distance fixed link telecommunications operator (Bichta 2001: 35). In 1991, the existing duopoly between BT and Mercury was ended and multiple licences (to cable, mobile and fixed market entrants) were granted to service providers in the domestic retail market (the duopoly in international retail service remained until 1996). Further liberalisation by government was sanctioned in contestable markets in telecommunications, such as the retail of telephone equipment (such as headsets). Crucially, however, both natural and strategic barriers to market entry remained. One way in which barriers to competition can be controlled is through the restructuring of an industry (Newbery 1999). Two reasons can be identified as to why BT was not restructured before its privatisation. The first is a potential technical problem: it is difficult to determine the size of units into which telecommunications could be broken into without the loss of technical economies of scale. The second, and perhaps the more telling, is the unpalatability of such a measure in the context of making a success of the floatation (Objective 4 in the Littlechild Report 1983; Ramanadham 1988: 279–280).

It has been often stated that the Littlechild Report is optimistic about the prospects for competition in the absence of restructuring. For Littlechild, competition is transformative and regulation is an essentially time-limited process (Bartle et al. 2002: 6). He predicted that sufficient competition would emerge in telecommunications within about five years to allow abolition of the price cap at that point (Stern 2003: 10). It is clear from the report, therefore, that Littlechild considered the abolition

of ex ante economic regulation as a realistic medium- to long-term goal for telecommunications policy. Crucially, the report makes an inverse relationship between competition and regulation: as the former increases, the latter should decrease in scope and intensity (1983: 7). As one regulatory official summarises:

> The original conception back in 1984 was that the regulators would be a temporary phenomenon, they would ease the passage of the industry into the sunny uplands of fully effective competition in the private sector, and they would wither on the vine within five or ten years … and actually you can track the history of regulation through the number of times there's been a speech where somebody has said 'probably just another five years and then we'll be there' … so if you step back from the detail and look at the big picture, the trend is more regulation and not less. That feels somehow counter intuitive, the markets are getting more competitive but we are doing more regulation. (Director, Ofcom, interview)

The conception of regulation as a temporary measure—'not a substitute for competition'—tasked with 'holding the fort' until competition arrives can be seen as a fundamental weakness of the neoliberal tradition (Littlechild 1983: para 4.11). The failure to recognise the need for ongoing, repeat regulation has led to an iterative, incremental process of adjustment over time and strategically orientated the debate in favour of particular deregulatory narratives. While Littlechild's initial recommendations and advocacy of regulation as an essentially transitory intervention were specific to telecommunications, the idea that regulation was inherently burdensome sets the tone for the ensuing debate on other public utility sectors. Indeed, in a separate report with Michael Beesley published in 1983, Littlechild claimed that RPI-X is:

> inappropriate if competition is not expected to emerge. It is a temporary safeguard, not a permanent method of control. The one-off nature of the restriction is precisely what preserves the firm's incentive to be efficient, because the firm keeps any gains beyond the specified level. Repeated cost-plus audits would destroy this incentive and moreover encourage 'nannyish' attitudes towards the industry. (Beesley and Littlechild 1983: 20)

As such, subsequent regulation has invariably been portrayed as 'regulatory creep' rather than the result of maturing governance regime. In other words, despite its increasing role in the governance of public utilities,

regulation has tended to be framed in an ideational context dominated by the neoliberal tradition. This position was made clear in a succession of DTI reports with such unambiguous titles as Lifting the Burden (1985), Building Businesses not Barriers (1986), Releasing Enterprise (1988) and Deregulation: Cutting Red Tape (1994). In Weatherill's (2007: 1) words, 'the rhetoric of deregulation dominated the day'—even though in reality the Conservatives found it difficult to realise their deregulatory ambitions because many ministers became dependent on the various regulatory bodies orbiting their departments (see Flinders 2008: 75–81). Even the conservative economist Irwin Stelzer, in a speech to the IEA (2000), commented that:

> All talk of 'light-handed regulation', of tiny regulatory bodies with small budgets and few in staff, and of avoiding 'American-style adversarial litigation' … was the stuff that Tory dreams were made on … the evolution of the regulatory regime to something closer to the American model was predictable, and not a function of any failure on the regulators' part to implement unrealistic expectations that regulation could kept to a minor chore.

Nevertheless, in this period the Conservatives were successful in constructing and perpetuating a distinctly individualist narrative that professed a lack of faith in regulation and prioritised market freedom. There is a disjuncture, therefore, between the ascendency of the neoliberal tradition of regulation as 'infringement on private autonomy' and the empirical reality of growing regulatory state (Prosser 2010).

Admittedly, Littlechild's proposition of a regulatory regime that was light-touch and transitional was specific to the telecommunications sector and not intended to apply universally to all network industries. He believed there were real opportunities for competition in telecommunications, which could be facilitated by 'good' regulation. The scope (as well as duration) of price control, even for the telecommunications sector, has been much more extensive and enduring than Littlechild originally envisaged. The adoption of RPI-X for all of BT services (such as international call charges) and not just the limited set of services (BT's business and residential rentals and local call charges only) recommended by the Littlechild Report is a reflection of the lack of competition fostered (Stern 2003: 16). These changes took the RPI-X formula a long way from both the form and intention of the control on local telephony charges proposed by Littlechild in his report (Bolt 2003: 69). However, significant

advances in communications technology and the globalisation of markets over the past 30 years have resulted in an increasing range of competitors in the telecommunications sector, such as electronic communication companies, infrastructure providers and cable and mobile telephony operators, which Littlechild had anticipated (1983: para 14.8). As a result, price cap regulation has gradually been withdrawn for BT retail services, particularly international and then national calls, although at a much slower pace than Littlechild originally envisaged. The removal of retail price caps in 2006, following Ofcom's Strategic Review of Communications, was seen as definitive evidence of an increasingly competitive telecommunications market, and a rare example of 'where the success of regulation is measured by the ability to remove it' (Holland 2006). Despite the end of 20 years of retail price controls, the regulation of telecommunications has not withered away over the last decade: Universal Service Obligations (USOs), protection for vulnerable users and the regulation (including price control) of the wholesale market (BT Openreach), especially broadband where BT holds 'Significant Market Power', have endured and in many ways have been enhanced since 2006. The indication from Ofcom's new Chief Executive, Sharon White, that the regulator will reconsider whether to split the retail and wholesale parts of BT demonstrates the ongoing issue of the company's market share and the continued need for regulation-for-competition.

Littlechild's predications for telecommunications stand in contrast, however, to his 1986 report on price cap regulation of the water industry, where the sunk costs of local networks created a 'natural monopoly par excellence' (Littlechild 1986: 5). In the case of water, Littlechild was obliged to confront the issues of probable permanent price cap regulation (Stern 2003: 4). As one interviewee commented, it is now widely accepted that:

> most networks have a widely distributed infrastructure, particularly if it is built in the ground, [which] means replicating it is not just expensive, it is massively disruptive. So generally [this] means you end up with a situation where you accept that there is effectively a monopoly in that infrastructure and you to provide regulated access to the monopoly or alternatively you require the running of that infrastructure to be separate from the delivery of service, which is what has happened with gas and electricity, where the network operator is different from the provider of the stuff over the network. (Director, BERR, interview)

The strategic learning process that has occurred in the regulation of public utilities is evidenced by two keynote speeches made by the then Economic Secretary to the Treasury, John Moore, who, as the government's key spokesman on the sale of nationalised industries, was dubbed 'Mr Privatisation'. In 1983, he stated unequivocally that 'The long term success of the privatisation programme will stand or fall by the extent to which it maximises competition. If competition cannot be achieved a historic opportunity will have been lost' (cited in Thompson 1988: 39). In a second keynote speech just two years later, however, his position had changed: 'I firmly believe that where competition is impractical, privatisation policies have now been developed to such an extent that a regulated private ownership of natural monopolies is preferable to nationalisation' (cited in Kay 1985: 6).

The British model of public utility regulation, supposedly competition driven and incentive based, has been characterised by the steady growth of regulation rather than its withdrawal. Part of the explanation is that even where there has been innovation, such as in mobile telephony, a general tendency towards market failure still exists:

> mobile telephony is a complicated market with big information asymmetries. Where there are only four players, it is not a perfect market. It's not anywhere near a perfect market, it's better than a single firm dominated market but not by that much in some ways … so we have been taken in the direction of re-regulation in some areas where we never expected. (Director Ofcom, interview)

A feature of the British regulatory state is that, despite the neoliberal rhetoric of 'consumer sovereignty', the drafting of the legislation meant the privatised utility company was obliged to respond to the consumer indirectly through the regulator. Utility companies, therefore, became ultimately more responsive to the regulator than consumers:

> they have to guess what the regulator wants … they have to try and influence the regulator and similarly for the customers it is not good persuading the company to do want you want if the regulator says you can't or the regulator says that's all very well but I'm not going to let you have any money to do it. (Littlechild, interview)

Echoing this sentiment, an Ofgem official argued that:

> The regulator is the customer. The privatised company collects money from what you would think is its customers, its users, based on what the regulator allows it to collect. So most of the regulated companies tend to see the regulator as their client, which they are seeking to manage (in order) to get the best outcome. Generally what tends to happen is that the regulated companies spend an awful lot of time developing their strategies, feeding their information through and developing their business plans so they can present whatever they need to present to their regulators. So what happens in our view is that the companies spend too much time trying to engage with us rather than trying to engage with their real customers, who are worried about services and so on … it's a natural thing for them to do but its perhaps not really healthy when you are looking at innovation and change and so on. (Director Ofgem, interview)

The conception of regulators as the arbiters of consumers' interests has ultimately tempered the radical nature of the neoliberal tradition. As one official explained, the key objective for regulation now is 'the protection of the interests of users' (Director, BIS, interview). Competition is seen as 'an addendum to that … wherever appropriate (the protection of users should be achieved) through the introduction or promotion of competition … competition is a means to end rather than an end in itself, and I think that's how most utility regulators would see it' (ibid.). Hence, the Communications Act 2003 defines the principal duty of Ofcom, as the newly established regulator for telecoms, broadcasting and postal services, as upholding 'the interests of consumers in relevant markets, where relevant by promoting competition' (Clause 3(1)(b)). The Public Utilities Act 2000 created a new primary duty on Ofgem with similar regard for the protection of consumer interests, via the promotion of competition 'wherever appropriate' (sec 3A.1). The energy regulator must also have regard for the interests of vulnerable customers, such as the disabled of chronically sick, pensioners, individuals on low incomes and those living in rural areas (sec 3A.3). Whilst this represented a shift in emphasis, with some such as former DTI minister John Battle (interview), claiming New Labour had introduced a new 'a vision of regulation with price, social justice and the environment' forming a three-pronged approach, overall continuity between the Conservative and Labour administrations was broadly maintained.

The passage of the Energy Act 2010, however, marked a departure from the competition-driven regime for public utilities by removing the legal primacy of competition for energy regulation (Stern 2014). The legislation, enacted in the final throes of the last Labour government,

required Ofgem to consider 'whether there is any other manner (whether or not it would promote competition…) in which the Secretary of State or the Authority (as the case may be) could carry out those functions which would better protect those interests [of existing and future consumers]' (2010, Clauses 16 and 17). The statutory framework for Ofgem includes the aim to facilitate sustainable development, help protect the security of Britain's energy supplies, provide a leading voice in Europe, tackle fuel poverty, and promote better regulation alongside the economic goals of regulating market failure and creating and maintaining competition (Ofgem 2001: 14). The increasingly wide scope of public utility regulation, particularly in the energy sector, has led to a rhetorical shift away from its original conception as competition-driven economic regulation.

As Stern (2014: 164) notes, 'the pro-competition perspective is not universal'. Telecommunications, despite to continuing monopoly power of BT, have become much more competitive market supported by liberalising EU legislation over the last 30 years. However, progress towards more market competition in the water and sewerage sector, as well as postal services and railways, has been much more piecemeal. Faith in the virtue of competitive energy markets, moreover, has been the subject of significant political and public debate (Stern 2014). The regulator not only has to consider the interests of consumers alongside economic efficiency, but also must consider whether there are alternatives or additional measures that might better protect consumer interests before taking action (Energy Act 2010, sec. 16[1C]). Hence, while privatisation seemed to herald the shift of autonomy away from the state to markets, in reality the limited degree of competition in public utility sectors demanded an enhanced 'market creating' role for the state as regulatory agencies were increasingly enmeshed in 'regulation-for-competition' (Jordana and Levi-Faur 2004a). Privatisation and successive rounds of re-regulation have led to an increasing 'imbrication' (Cerny 1999) between government, regulation and the private sector. This has implications for the dominant political and regulatory traditions in the UK, which although continuing to privilege informal, elitist and secretive modes of governance, have become more formalised.

The Formalisation of British Regulation

The RPI-X scheme was favoured not only because it was seen to be incentive based and competition driven, but also because it placed the minimum amount of discretion in the hands of the regulator, thus protecting

against agency 'capture' (Graham and Prosser 1991: 186). The key theme to emerge from the Littlechild Report was not that competition can always be fostered in public utilities to the point where regulation is obsolete, but rather that the systems of regulation should be made as non-discretionary as possible (Moran 2003: 104–107).

In theory, the RPI-X formula for price cap regulation constituted a powerful challenge to the informal and discretionary world of club regulation. The formula was designed to minimise discretionary intervention in economic decision-making, and in so doing, curtails the incentives for regulated industries to 'capture' the regulator. The 'credible commitment' of the new governance regime for privatised utilities was buttressed by the creation of IRAs, such as the Office of Telecommunications (Oftel, Gilardi 2005). The establishment of a statutory boundary between the government and the regulators has come to be seen as the 'cornerstone' of the British regulatory model (Stern 2014: 163). Despite its close association with 'British model', the independence of the regulator was far from axiomatic in the planning of utilities privatisation. Parker (2009: 253–254) details how Treasury officials were reluctant to release central control over BT's finances entirely, especially while the state continued to have a large stake in the company. Conversely Patrick Jenkin, then Secretary of State for Industry, argued that continued Treasury oversight would inhibit BT's ability to borrow from the market and invest in modernisation, negating the key advantages of privatisation. The advice of Kleinwort Benson (the private bank and financial services firm) that a credible commitment to commercial and regulatory independence was needed in order to achieve investor confidence and facilitate a majority sale of BT shares was instrumental in persuading the Prime Minster and the key actors in the Official Committee of Telecommunications Policy (E[TP]) of the need to relinquish a denationalised BT from Treasury control. The level of disquiet between the Treasury and the Department of Industry on this matter was evidenced by Geoffrey Howe's, then Chancellor of Exchequer, attempt to refer BT to the MMC in November 1981, which would have threatened to delay the privatisation and potentially damage the likelihood of a successful floatation. This prospect ultimately strengthened the case of the Department of Industry and BT, with the Prime Minister supporting the view 'that denationalisation must not be jeopardised' (Thatcher cited in Parker 2009: 255).

The commitment of the core executive to ensuring the success of the BT privatisation was crucial in overcoming the concerns of various parts

of Whitehall. In addition to the Treasury and the Department of Trade, the Home Office had also expressed reservations about the security implications of public body outside of government control. Even within the Department of Industry, however, there was considerable trepidation about what regulatory independence would actually constitute in practice. In the licensing of operators, which determine the rules under which companies operate and are designed to provide certain assurances and a measure of regulatory stability, the government still continued to exercise a large degree of discretion. It was decided that the Secretary of State for Industry would hold the authority to issue licences to new entrants in the market. It was also assumed that the Secretary of State would have the final say on any proposed licence amendments made by the telecoms regulator. In Britain, licence modifications do not require the consent of the regulated company and can be made against its will (on the proviso that both the competition authority and the Secretary of State agree [Levy and Spiller 1994: 228]). However, the input of Kleinwort's again proved instructive, who advised the government to establish some 'clear blue water' between policy and regulation in light of securing a successful Initial Public Offering (IPO) of BT. Instead, any objections from companies regarding changes to licence conditions were be referred to the MMC, who would adjudicate on whether 'due process' has been followed (Parker 2009: 268). However, regulators do not necessarily justify their decisions (although in telecommunications the regulator conventionally has done so) nor hold public hearings. As a result, the British regulatory process remained very flexible in design, with the government still able to exercise a large degree of authority over the governance of public utilities.

The decision to establish the Oftel as a 'non-Ministerial department' to be staffed primarily by civil servants, rather a non-departmental public body, was a deliberate compromise designed to provide some ostensible distance from political control to satisfy investors, on the one hand, while maintaining a clear line of hierarchy to the Secretary of State and Parliament. The notion of 'independent regulation' is therefore somewhat of a misnomer: 'from the early planning stage there was recognition that the regulator's independence would have to be tempered to minimise any risk of possible conflict between Ministerial policy on telecommunications and that of the regulator' (Parker 2009: 269).

The regulatory settlement that was reached militated much of the neoliberal radicalism of Littlechild's proposals. For Littlechild, 'The good regulatory regime minimised discretion' (Moran 2003: 107). This was seen

to be particularly acute in regulation of price, and any direct political control of prices was quickly rejected by the E(TP). In practice, however, the process of price control was far from an application of non-discretionary, economic 'science'. The evolution of RPI-X for the regulated elements of all privatised enterprises (telecommunications, gas, electricity, water, railways and airports) diverges from the interpretation of RPI-X as a non-discretionary formula. Firstly, there was the problem of how X was to be set at the appropriate level in the first place (as well as the basket of services that it would apply to). This is evidenced by the wrangling between BT and the Department of Industry over the extent of company's input into the setting of the X factor. In an effort to maintain the tight schedule for privatisation, three BT employees were admitted to an RPI-X study team also comprising three government officials, Professor Bryan Carsberg (the appointed DGT) and an independent auditor (Parker 2009: 282). The wide discrepancy in the projected calculations of X by the different members of the Study Team (between 1 and 7.5 % between BT and Treasury members, respectively) demonstrated that Littlechild's recommendations for a price cap, 'seemingly straightforward on paper, would be far from straightforward in reality' (Parker 2009: 283). In the end, the Study Team was disbanded and the independent auditor was personally asked by Kenneth Baker[6] to 'cut through some of the tangle' in order to reach a figure: he recommended an X factor of 3 %,[7] aware that this was the level favoured by the DTI.[8] Far from an economic science, 'the initial determination of the formula was itself not only the subject of discretionary judgement, but of the kind of off-the-cuff insider's agreement characteristic of the club system' (Moran 2003: 108).

The BT Board was placated through a capital restructuring programme that reduced its equity-to-debt ratio from 60 to 48 %, with the government taking on £1250 million pension liability rather than transferring it to the new company (Ganesh 1999). The final outcome was an inherent comprise, subject to approval by core actors in No. 10 and the Treasury, which sought to balance the political considerations of ensuring a timely and successful floatation and more ideological goals of liberalisation and limiting BT's monopoly power as the incumbent provider (Gamble 1988b). Subsequent privatisations continued to follow this more pragmatic, rather than scientific, process. In setting the original value of X in the opening price formula for gas, James McKinnon, the first DG of Gas Supply, revealed he was told that it had ultimately came down to a 'judgement call' (1993: 120). When he pressed officials to 'understand the general

thrust of the judgement' he was informed that the value of X had been set, 'To get the company off to a good start' (ibid.). The eventual level of X in each case was the result of discussions between key players on the inside and outside of government about how to balance multiple and at times contradictory objectives (Rutter et al. 2012).

Despite the avowed aim to minimise regulatory discretion, the use of judgement and discretion was inherent in the system of utility regulation after privatisation. Perhaps this is to be expected in the tentative early stages of privatisation when regulators need to learn about the environment within which they operate (Graham and Prosser 1991: 188). However, the enduring presence of regulatory discretion is also reflective of the ideational and institutional context in which privatisation regulation was created. The key decision-makers in privatisation and re-regulation were ministers and officials who had been shaped by the club model of regulation that had stressed freedom from public accountability, wide exercise of discretion and the privileged tacit knowledge of insiders (Moran 2003: 104). They were also part of the wider institutional and ideational context associated with the BPT and inculcated in the culture of 'government knows best'. The idea that regulatory decisions would be determined by a non-discretionary, rules-based economic formula was alien to this central precept of both the dominant British political and regulatory traditions. Thus, while the underlying economic principles of the RPI-X posed an intellectual challenge to the British regulatory tradition, its implementation was shaped by the prevailing ideational and institutional context, and so was broadly consistent with the dominant regulatory and political traditions.

As Moran (2003: 106) identifies, the regulatory regime that emerged after privatisation reflected different and to some extent contradictory influences: 'in part, [it] … grew out of a conscious disillusionment with the closed world of club government and what it has done to the nationalised industries … and, in part, … [it] reflected the continuing influence of the club world'. Whereas, the former led to an attempt by the Littlechild Report to impose a competing neoliberal tradition of regulation, where discretionary intervention by regulators would be minimised, the continued influence of the British regulatory tradition on institutions and practices mitigated its impact. Despite the radical rhetoric, the transition to this 'new' regulatory model was infused with a pragmatism and incrementalism that is redolent of a more long-standing regulatory tradition in the UK. As Littlechild (2014: 154) concedes retrospectively, 'it is apparent that we were all engaged in a rivalrous discovery process'.

Describing the task of evaluating the alternatives for the regulation of telecommunications, Littlechild highlights that 'The challenge was to ascertain the preferences and requirements of the various key parties (notably the Government and BT, who were in effect the "customers" in this process), and to devise a form of regulation that would best meet these needs' (Littlechild 2014: 154). As such, the decision-making process on the future of utility regulation was orientated towards the commercial needs and preferences of BT and the interest of the incumbent Conservative administration. Contrary to the widely held view that the management of BT was excluded from the planning of the regulatory regime, their views were keenly sought and taken into consideration. In this sense, the incentive-based regime that was eventually introduced 'built on a suggestion that BT's own advisers had made' (Littlechild 2014: 154). Indeed, in spite of the close association between RPI-X and Professor Littlechild, he himself had to be convinced of its virtues, admitting that 'the last thing I wanted was to go down in history as a man who invented another price control' (Littlechild 2014: 154). Despite the popular belief that RPI-X was a radical innovation based on the intellectual conviction of a neoliberal Austrian School economist, the new regulatory regime for telecommunications emerged out of a much more messy and muddled political process of negotiation, compromise and conciliation between government departments (notably the Treasury and the Department of Industry) and BT. Rather than the economistic, non-discretionary system it was purported to introduce, both the deliberation on the plans for the new regulation and the actual execution of the established regime were characterised by an informality, adhocery, compromise and conciliation that characterised the pre-existing British regulatory tradition.

The compromises made between this small, closed group of political and economic actors reflect the elitist nature of the dominant political and regulatory traditions in the UK. The decision-making process was highly centralised. It centred on the small group of core executive actors in the Official Committee on Telecommunications Policy (E[TP]), chaired by the Prime Minister, which was supported by advice from the Department of Industry, the No. 10 Policy Unit, the CPRS and the financial adviser Kleinwort Benson (Parker 2009). In retrospect, Littlechild (2014: 154) observes how he is 'struck by how one-sided' the negotiation on devising a system of regulation was for the soon-to-be privatised telecommunications sector. In keeping with the British regulatory tradition, the process was dominated by a core political and economic elite. Littlechild (2014: 154) states that:

> It took place entirely within Government: primarily the Department of Industry, the Treasury, and the Central Policy Review Staff (CPRS) within the Cabinet Office, later on other departments and the MMC and Office of Fair Trading (OFT), and the Department of Industry's merchant bank advisers Kleinwort's. Ministers, too, were occasionally allowed to chip in.

Not only was the process closed to all but a few actors, it was also typically informal. Littlechild's observation that 'The first attempt to ascertain BT's views on the subject of its future regulation appears to have been my dinner meeting with BT's chairman and merchant bank advisers, in the chairman's flat', suggests that the privatisation hardly signalled the end of 'club regulation' in the UK.

The centralised nature of the process, with no opportunity for consultation beyond these core actors, enabled the Conservative government to prepare the drafting Telecommunications Bill 1982 at a considerable pace. The inclusion of a pledge to sell-off a majority of BT's shares in the 1983 Conservative election manifesto enabled the government and BT management to claim a mandate for privatisation, which went some way in nullifying the unions and the Labour Party's opposition (Parker 2009). However, the failure to engage with a broad range of stakeholders (such as the trade unions, consumers, suppliers and interest groups) was reflected in a long and contentious passage through Parliament, with the Thatcher government applying the 'guillotine' in order to push the bill through the House of Commons.

The absence of prospective customers in the privatisation of BT seems counter-intuitive given the emphasis on consumer 'sovereignty'. Privatisation and regulation, akin to other putatively decentralising initiatives in the UK, were planned and executed from the top-down, with no opportunities for wider stakeholder consultation or participation. Groups representing consumer interests in telecommunications, such as the Post Office Users' National Council (POUNC), were not included. A former DTI official said that POUNC were not extensively 'involved (in the privatisation of BT) … the government took the view that we look after consumers, we are setting up the regulatory regime that's going to make everything all right for them, we are being tough with BT' (Civil servant, DTI, interview). When access was given it was done so on the proviso that consumer representatives accepted the 'rules of the game'. A comment from the former Chairman of the POUNC demonstrates how these informal rules and norms were inculcated among the wider network of actors, stating that:

> a lot of it was done by private discussions too, very often you achieve more that way than by getting on a soapbox, certainly during my time I did not favour the soapbox politics, I used to make it clear that I would not criticise for the sake of criticising … otherwise you lose a bit of credibility if you complain about everything that is happening … people say well this chap is just a great big grumbler. (Corrigan, interview)

Although, following criticism, user committees representing consumers, as well as the elderly, disabled and small businesses, were introduced later on, 'generally the independent consumer pressure bodies have been very weak and lacking in influence' (Private Secretary to Minister for Energy, interview). In fact, underlying much of the debate on consumer representation is the assumption that 'the regulator himself exists to represent consumers, and does, and should act to protect their interests against those of the industry' (McHarg 1994). This view of the paternalistic regulatory state, in line with of the BPT, has shaped the outlook of consumer groups as well as the regulatory agencies. For example, McHarg (1994) cites the former Electricity Consumer Council's view that it should cease to exist after privatisation because 'it would get in the way of the regulator' (HC 307II, 1987/8: 83). It is the regulator, as an agent of the state, which is perceived as the guarantor of the public interest rather than consumer representatives. The lack of formal role for consumers in the regulatory process reflects the limited liberal conception of representation of the dominant political tradition. This is justified by the regulator according to a conservative notion of responsibility: it is the regulatory agencies that have the knowledge, expertise and moral integrity to regulate the utilities in the public interest. A former DG of Electricity Supply commented that 'I think there was a … and to a significant extent still is a feeling that we need to do things that are in the public interest and we need to a do a decent job … and there is that culture within the bodies of the industries still' (interview). The neoliberal rationale had been that increased competition would eventually eradicate the need for the regulator to play this arbitration role, as competition would act as a mechanism for balancing and reconciling divergent interests in the market. The lack of competition in public utility markets, however, has meant regulatory agencies have continued 'to undertake that balancing function … as an arbiter between interests' (McHarg 1994: 9). The discretion of the regulator also extends to consumer representation. The Gas Consumers Council (1994), in a response to the Energy Select Committee, argued that effective consumer

representation is 'in practice dependent upon the regulator's good will rather than as the result of formal proximity'. Despite the intellectual impact of the neoliberal tradition, the essential form of public utility governance on Britain remained top-down and:

> determined by the regulator rather than by the firms or customers in the industry, the views of customers or their representatives exercise only limited influence, to the extent that the regulator listens and responds to their submissions in the course of consultations, there is no market or regulatory process tending to discover and bring about regulatory models that better reflect the preferences of customers. Put rather provocatively, the regulator is a monopolist exercising its market power. (Littlechild 2014: 155)

There have been recent moves to incorporate the views of consumers more directly in the regulatory process. Since 2010, energy and water companies that can evidence a record of effective consultation with consumers can be 'fast-tracked' by Ofgem and Ofwat through the regulatory process. Conversely, laggards in this 'constructive engagement' with consumers are 'slow-tracked' and subjected to more rigorous and extensive scrutiny (Stern 2014). Advocates of this consumer engagement, such as Professor Littlechild, have argued that it needs to be extended and more firmly embedded in the structures and philosophy of utility regulation in the UK. Currently, the weight attached to consumer engagement is at the discretion of the regulator; 'the negotiations do not determine the regulatory outcome' (Stern 2014: 171). However, the use of negotiated settlements, where consumer representatives negotiate directly with utility companies on price, new investment, service standards, and so on, have had a limited role in UK regulation, despite their increasing prominence in the USA (Littlechild 2012) and Canada (Doucet and Littlechild 2009). So far only the Scottish water regulatory (WICS) has formally incorporated direct negotiation between the company (Scottish Water) and its customers into the regulatory model; and even here the regulator retained the right to reject or modify any agreed business plan (Littlechild 2014). There has been a resistance by public utility regulators to adopt fully fledged negotiated settlements and assume a more facilitation role in the regulatory process.

In continuing to portray themselves arbiters of the 'consumer interest', the debate on the role of the regulatory agencies has been decisively shaped by the BPT, supporting the argument that the limited liberal conception of representation and the conservative notion of responsibility are not only ingrained within the existing institutions of the state but also critical to the

development of emerging ones. In this sense, privatisation can be understood as a process of 'layering' (Thelen 2003), whereby new institutional arrangements are grafted onto existing structures without actually replacing them (Horton 2006: 33). The governance of public utilities post-privatisation has therefore evolved within the context of the BPT, rather than representing a rupture with the dominant political tradition. However, the interaction between the prevailing BPT and a competing neoliberal tradition has led to points of tension within the regulation of public utilities.

The goals of competition, especially in the absence of an effective market in a regulated network, may not always be necessarily in synergy with the 'full range of public interest objectives' from the perspective of ministers or indeed citizens (Bolt 2014: 175). This potential incongruence between competition and perceived public interest is a recurring tension at the heart of the relationship between the neoliberal vision of regulation and wider understandings of the BPT. In circumstances where the goals of competition do not seem to be in the public interest, the role of responsible government will be invariably invoked. Herein lies the key paradox of the British regulatory model for utilities—while the wider tradition of responsible government enables the acting administration to take deeply unpopular decisions in the name of putative public interest, the need to be (at least) seen to be responsive to the public's demand for action over privatised enterprises can prove irresistible. Although operating according to regulatory licences, privatisation actually functioned in form and content according to 'the old, abandoned concept of the company as the product of concession by the state' (Moran 2003: 103). In this concessionary model, prevalent in the development of railways and the electricity industry in the nineteenth century (Stern 2003), the company is viewed as legal creation upon which the state confers special privileges (such as monopoly rights, the right to infringe the private property entitlements of others in the construction of networks, the grant of land or other public property), which are 'beyond the reach of private agreement' (Parkinson 1995: 32). In this model of corporate governance, these privileges are contingent on the execution of certain civic obligations and the recognition of some constraint by the state on corporate practice in the wider public interest (Moran 2003: 98). Although largely inadvertent, the regulation of privatised utilities entailed the 'revival of this hitherto anachronistic model of corporate government' (Moran 2003: 98). As noted above, privatisation involved significant concessions to the management of public utilities on issues such as restructuring, share price, debt liability, to ensure their cooperation in a successful flotation.

The conferring of such privileges to the private sector has increasingly drawn the state into the governance of privatised utilities. Despite the deficiencies of the nationalised industries, both Labour and Conservative governments were able to appeal to the conservative notion of responsibility, in arguing that nationalisation was justified in the public interest. The putative 'public' character of nationalisation enabled ministers to anoint the boards of nationalised industries as 'high custodians of the public interest' (Morrison 1933: 156), even though 'they would be the same people, operating in the same way' as under private ownership (Marquand 1992: 107). Of course, rhetorical appeal to the need for 'systems of administration and control to promote not profiteering, but the public interest' (Webb 1918: 12) can be traced back to the original treatise of the Labour Party. While instinctively opposed to the further extension of nationalisation, the Conservative Party's acceptance of the mixed economy also saw them express, in more muted tones, the wish to keep strategic industries in 'British hands'. When dissenting voices to the dominant to One-Nation toleration of nationalisation did emerge within the party, this was ultimately suppressed (such as the 1968 Ridley Report). Despite the somewhat contradictory goals of 'efficiency and social responsibility' (Labour Party 1950), the interpretation of nationalisation as a victory for the public interest 'had embodied a common sense that reigned for a generation' (Marquand 2010: 295). Until the 1970s, it was largely effective in obfuscating the reality, which was that nationalisation had constituted an expansion of the central state, eclipsing local municipal governance of public utilities, rather than the broader concept of the 'public domain' (Marquand 2004). Whereas the public domain has civic engagement and debate at its heart, the nationalised sector limited participation and operated according to a thin notion of parliamentary accountability.

In diminishing the public character of utilities, privatisation repoliticised, rather than depoliticised, these questions of participation and accountability. In granting considerable concessions to the newly privatised utilities, the determination of the public interest was returned to central government. Denationalised utilities were neither fully private associations (under company law) nor part of the state; in this vacuum the need to establish legitimacy has been met with a traditional emphasis on the conservative notion of responsibility, that is the (regulatory) state knows best.

To borrow David Marquand's phrase, privatisation (like nationalisation before it) was a 'strange, though characteristically, British doctrinal

mélange' (1992: 106). It can be seen as an attempt to marry two disparate sets of ideas and values:

> a distinctly modernist attempt by Littlechild to create an open, transparent world of non-discretionary regulatory decision guided by fixed rules; and the very different attempt of the old discretionary creators in Whitehall to replicate as much as possible of the old discretionary and informal world that privileged insiders in the club system. (Moran 2003: 120)

The neoliberal tradition of utility regulation is therefore undermined by this central paradox: in an attempt to depoliticise the management of public utilities through the introduction of privatisation and an ostensibly non-discretionary econometric regulation, the Conservative governments of the 1980s and 1990s actually increased the likelihood of government intervention on matters such as utility prices and remuneration. As Bolt (2014: 177) concludes, 'experience suggests that ministers will indeed see the need to intervene in response to "events", whatever is published in a strategy statement'. Even at the point of BT's privatisation, ministers and officials were 'mindful of the political consequences if charges to the general public rose in real terms after privatisation … [and] believed an important objective of RPI-X should be realising cost reductions for the benefit of customers not sanctioning higher prices and profits' (Parker 2009: 283).

This account repudiates the conventional view that the new regulatory regime for privatised utilities was a purely ideological exercise driven by neoliberal ministers and economic advisers, which marked a clear diversion from established practice and the relationship between the government and the management of public utilities. Privatisation involved a deliberate attempt on behalf of the Conservative government to avoid the form of telecommunications regulation in the USA, which was seen from a British perspective to be bureaucratic, prone to agency capture and litigious (Parker 2009). Although it is often interpreted as a shift to a non-discretionary, econometric regime, the negotiation over the introduction of RPI-X was 'painful and protracted', involving iterative dialogue between the government and BT as the main political and economic actors (Littlechild 2014: 155). The process of constructing a new regulatory regime post-privatisation continued to be shaped by the British regulatory tradition: it was the closed, informal and elitist, excluding other key stakeholders, and the preference was for compromise and conciliation behind closed doors over adversarialism and legality in public.

Conclusion

The intellectual challenge of the neoliberal tradition to the prevailing British regulatory tradition undoubtedly led to some important changes in the governance of public utilities in the UK. The regulatory vision of Littlechild sought to replace the informal system of 'club regulation' with a non-discretionary regime based on neoliberal economic rationality. However, this does not mean that the key tenets of the dominant regulatory and political traditions were supplanted. Privatisation and re-regulation occurred within an ideational, institutional and cultural context shaped by the BPT. Faced with the challenges of an unproductive nationalised sector, a lack of capital to invest in much needed modernisation and a sizeable budget deficit,[9] the Conservative government privatised public utilities in a way that remained consistent within the prevailing ideational and institutional context of the British regulatory tradition.

Nevertheless, the unintended consequences of fragmentation and increased politicisation of regulation have produced an environment of contestation for the British regulatory tradition. However, in contrast to Moran (2003), this chapter argues that this constitutes an ongoing process of challenge and contestation rather than the collapse of the club model of regulation. Rather, the evolution of public utility regulation highlights the continued importance of the dominant ideas and values that have shaped British political life and the long-established patterns of dominance and asymmetry in reconstituted form. Key features of the British regulatory tradition such as discretion, informality, secrecy and continuity remain core characteristics of public utility governance in the UK. The concept of a regulatory tradition offers a lens through which to understand one of the key paradoxes of British politics: how can the anti-statism of a supposedly hegemonic neoliberal ideology be reconciled with the significant expansion of the regulatory state post-1979?

Despite the significant changes, therefore, there remain continuities in the governance of public utilities post-privatisation. There exists little formal consumer representation, while government 'meta-steers' the governance of public utilities assisted by the regulators who to enjoy a wide discretionary role. Hierarchy, therefore, remains important, although it does exist alongside a regulatory environment of increasing complexity, fragmentation and self- and co-regulation. Regulatory outcomes, moreover, tend to favour economic and financial elites. This is reflected by the fact that in most instances, regulatory objectives and targets tend to be

pursued through a cooperative and often voluntary approach, which has actively sought the endorsement of the City.

While privatisation was seen as an integral part of the share-owning democracy vaunted by Thatcher, the majority of shares in privatised utilities were taken by financial institutions and foreign investors: while the number of individual shareholders increases from 3 to 11 million between 1979 and 1993, private shareholding as percent of the total stock capitalisation steadily declines (from approximately 40 % to 20 % in the same period). The rhetoric of the 'people's capitalism' (Grimstone 1987) has disguised the key role played by the City in orchestrating the privatisation programme, which came to form a key plank of the strategy of financialisation that was embed what Hay (2013) calls the 'Anglo-liberal growth model' over the next two decades (Davis and Walsh 2015; Gamble 2013). Financial advisers, such as Simon Linnett of Rothschild and David Clementi of Kleinwort's, in operating as key power brokers between the government and the City were able to shape the privatisation programme in the interests of the financial sector. Linnett has claimed that 'the boost of managing the massive share sales was the foundation for pushing London alongside New York and Frankfurt to become the world centre of financial services' (Rutter et al. 2012: 57–58). In this context, Moran (2003: 103) argues that the terms of most privatisations amounted to 'largesse' by the state: the transfer of public assets to the private sector at deep discount, which granted control (often amounting to monopoly) over the production and marketing of goods and services held as basic necessities of life.

In the British context, regulation has always been concerned with dissipation of conflict between social protection and the interests of capital. The re-regulation of privatised utilities, therefore, represents a strategic attempt to maintain the status quo by the capitalist state that serves the (often mutual) interests of the political and economic elite. Analogous to Marx's analysis of the nineteenth-century Factory Acts, the regulatory agencies established in the wake of privatisation have been tasked with reproducing the 'systematic equilibrium' necessary to sustain a capitalist social order (Tombs 2015: 14–15). This more nuanced relational perspective on the role of state regulation demonstrates that 'The power of capital depends not upon the rolling back of the state, or diminution of state power, but also on the successful mediation and dissipation of particularly contentious issues, or issues that threaten a stable social order' (Tombs 2015: 15).

The dichotomy between individualist and hierarchical perspectives on regulation is ultimately unhelpful. The rhetoric on deregulation has been exploited to sustain the pretence that neoliberalism is about the freeing of competitive market forces, when in reality the story of privatisation is about regulation designed to create markets and mimic competition. Therefore, the neoliberal tradition buttresses rather than weakens the dominant political and regulatory traditions. Privatisation and the creation of a raft of regulatory agencies have enmeshed the state in the governance of public utilities. Despite the notion of depoliticisation, the state is held responsible for the outcomes of public utility providers, not only as a regulatory policemen of externalities but also as the architect and facilitator of this regulatory regime.

This is not to suggest, however, that privatisation and re-regulation of public utilities do not have unintended consequences and may not open up the 'a window of opportunity' for further challenges in the future. Rather than determining whether there has been a break or continuation, attention should focus upon identifying the formation of future challenges to both the dominant political tradition and British regulatory tradition as a result of privatisation and re-regulation. The consequences, both intended and unintended, of privatisation and re-regulation may themselves come to represent future challenges to central tenets of the dominant tradition(s) and are therefore worthy of consideration. Indeed, privatisation and re-regulation revealed tensions between the dominant political and regulatory traditions. The associated hierarchy of the conservative notion of responsibility contrasts with the more individualist outlook of the regulatory tradition, with its emphasis on conciliation and non-intrusion. Attempts to steer the regulation of public utilities through hierarchical mechanisms such as social and environmental guidance, therefore, creates points of tension between these two dominant paradigms. These points of tension in UK regulation were brought into sharp relief in the post-2008 context of the financial crisis, which is considered in Chap. 7.

Notes

1. Secretary of State for Energy, 1979–81, and Secretary of State for Transport, 1981–93.
2. This was the Final Report of the Nationalised Industries Policy Group, chaired by Nicholas Ridley, MP. The report made several policy proposals for the running of nationalised industries, including the recruitment of chairmen

'who will be sympathetic to our [*sic*] objectives' (The Nationalised Industries Policy Group, 1977: 22). The report also contained a confidential annex that was only circulated amongst a small group of ministers about possible strategies to counter the 'political threat' (such as strikes) to the policy on nationalised industries. The report, together with the annex, was leaked to *The Economist* in May 1978 and attracted considerable controversy.

3. Shares in the privatised public utilities were deliberately offered at discounted prices, providing investors with an immediate profit when trading opened.
4. Both the output-related profit levy (ORPL), advocated by Walters, and maximum rate of return (MMR), favoured by officials in the Department of Industry, had been deemed inadequate by Inter-Departmental Working Group in 1982.
5. It is important to note that utility regulation in the UK involves a number of different jurisdictions and regulatory regimes across the devolved territories. Energy regulation for gas and electricity, for which Ofgem is the competent authority, applies to Scotland, England and Wales (i.e., Great Britain). Water regulation, on the other hand, is organised on a different territorial basis: Scottish Water, a single publicly owned company, is regulated by the Water Industry Commission for Scotland (WICS), whereas in England and Wales the water and sewerage services are provided on a regional basis by 32 operating companies, under the supervision of Ofwat and the Drinking Water Inspectorate (DWI) for private water supplies. In Northern Ireland, energy and water industries are overseen by a single utility regulator. Ofcom, however, has jurisdiction over telecommunications and broadcasting regulation across the UK, with offices in London, Belfast, Glasgow and Cardiff. Notwithstanding these overlapping regulatory terrains for public utilities, the terms British and UK regulation are used interchangeably in this and subsequent chapters.
6. Who as Minister of State for Industry and Information Technology (1981–84) had key role in facilitating the privatisation of BT.
7. This was subsequently raised to 4.5 % in 1989 and then 7.5 % in 1993.
8. The departments of Trade and Industry were merged in June 1983.
9. Or public sector borrowing requirement (PSBR) as it was hitherto called.

Bibliography

Abromeit, H. (1988). British privatisation policy. *Parliamentary Affairs, 41*(1), 68–85.

Bartle, I., Mueller, M., Sturm, R., & Wilks, S. (2002). *The regulatory state: Britain and Germany compared*. London: Anglo-German Foundation for the Study of Industrial Society.

Bel, G. (2006). Retrospectives: The coining of. *The Journal of Economic Perspectives, 20*(3), 187–194.
Beesley, M. and Littlechild, S. (1983). Privatization: principles, problems and priorities. Lloyds Bank Review, 149: 1–20 (reprinted in Beesley, M.E. (Ed.): Privatization, regulation and deregulation. London: Routledge, 2nd edition, pp. 27–42).
Beesley, M. E. and Littlechild, S. C. (1989). The regulation of privatized monopolies in the United Kingdom. RAND Journal of Economics, *20*(3): 454–472 (reprinted in Beesley, M.E. (Ed.): Privatization, regulation and deregulation. London: Routledge, 2nd edition, pp. 58–83).
Bevir, M., & Rhodes, R. A. W. (2003). *Interpreting British governance*. Psychology Press.
Bevir, M. and Rhodes, R.A.W. (2006). Governance Stories. London: Routledge.
Bichta, C. (2001). The UK Telecommunications Industry 2001, Industry Brief. Bath: CRI.
Bolick, C. (1995). Thatcher's Revolution: Deregulation and Political Transformtion, Yale Journal on Regulation, *12*, 527–548.
Bolt, C. (2014). UK experience of utility regulation since 2003 and outlook. *Utilities Policy, 31*, 173–177.
Cardona, G. (1978). George Cardona report to MT (inconclusive investigation of Ridley Report leak). Available online: www.margaretthathcer.org/document/111659
Cerny, P. G. (1999). Globalization, governance and complexity. *Globalization and Governance, 1*, 188.
Crozier, M., Huntington, S. P., Watanuki, J., & Commission, T. (1975). *Crisis of democracy: Report on the governability of democracies to the trilateral commission*. New York University Press.
Davis, A., & Walsh, C. (2015). The role of the state in the financialisation of the UK Economy. *Political Studies*. DOI: 10.1111/1467-9248.12198
Doucet, J. and Littlechild, S. (2009). Negotiated settlements and the national energy board in Canada. Energy Policy, *37*(11), 4633–4644.
Drucker, P. (1969). *The age of discontinuity: Guidelines to our changing society*. New York, NY: Harper and Row.
Dunsire, A. (1995). Administrative theory in the 1980s: a viewpoint. Public Administration, *73*(1), 17–40.
Ernst, J. (1994). *Whose utility?: The social impact of public utility privatization and regulation in Britain*. Buckingham: Open University Press.
Flinders, M. (2008). Delegated Governance and the British State: Walking without Order. Oxford: Oxford University Press.
Foreman-Pek, J. (2004). How privatisation has changed Britain, Available online: bbc.co.uk/1/hi/business/40616313.stm

Gamble, A. (1988b). Privatization, Thatcherism, and the British state. *Journal of Law and Society, 16*(1), 1–20.
Gamble, A. (2013). The official history of privatisation: Volume 1. The formative years 1970–1987. By David Parker. *Twentieth Century British History, 24*(1), 155–157.
Ganesh, G. (1999). *Privatisation competition and regulation in the United Kingdom: Case studies.* Mittal Publications.
Gassner, K., & Pushak, N. (2014). 30 years of British utility regulation: Developing country experience and outlook. *Utilities Policy, 31*, 44–51.
Gilardi, F. (2005). The institutional foundations of regulatory capitalism: The diffusion of independent regulatory agencies in Western Europe. *The Annals of the American Academy of Political and Social Science, 598*(1), 84–101.
Graham, C., & Prosser, T. (1991). *Privatizing public enterprises: Constitutions, the state and regulation in comparative perspective.* Oxford: Oxford University Press.
Graham, C. (1995). Privatization – The United Kingdom experience, Brooklyn Journal of International Law, *21,* 185–195.
Greenleaf, W. H. (1983a). *The British political tradition: The rise of collectivism. Volume One*. Routledge.
Grimstone, G. (1987). Privatisation: The unexpected crusade. *Contemporary British History, 1*(1), 23–25.
Hall, S. and Jacques, M. (1983). The politics of Thatcherism. London: Lawrence and Wishart.
Hay, C. (2013). The Failure of Anglo-liberal Capitalism. Basingstoke: Palgrave Macmillan.
Hayek, F. A. (1978). Competition as a Discovery Procedure. In New Studies in Philosophy, Politics, Economics and the History of Ideas. Chicago, Ill.: University of Chicago Press.
Heald, D., & Thomas, D. (1986). Privatization as theology. *Public Policy and Administration, 1*(2), 49–66.
Heywood, A. (1997). *Politics.* Houndsmills: Macmillan Press Ltd.
Holland, M. (2006). *Ofcom puts an end to 22 years of retail price control for BT.* itPRO. Retrieved June 8, 2014, from http://www.itpro.co.uk/90563/ofcom-puts-an-end-to-22-years-of-retail-price-control-for-bt
Horton, S. (2006). The public service ethos in the British civil service: An historical institutional analysis. *Public Policy and Administration, 21*(1), 32–48.
Jordana, J., & Levi-Faur, D. (2004a). The politics of regulation in the age of governance. In Jordana, J. and Levi-Faur (Eds.) *The politics of regulation: Institutions and regulatory reforms for the age of governance* (pp. 1–28). London: Edward Elgar.
Jordana, J., & Levi-Faur, D. (2004b). *The politics of regulation: Institutions and regulatory reforms for the age of governance.* Edward Elgar Publishing.

Kay, J. A., & Silberston, Z. A. (1984). The new industrial policy—Privatisation and competition. *Midland Bank Review, 8*, 8–16.
Kay, J. A. (1985). Who benefits from privatisation?. The City-Association lecture. City of London Polytechnic. Certified Accountants Educational Trust.
Keay, D. (1987). Aids, education and the year 2000. *Woman's Own*. Available at: http://www.margaretthatcher.org/document/106689
King, A. (1975). Overload: Problems of governing in the 1970s. *Political Studies, 23*(2–3), 284–296.
King, A. S. (1976). *Why is Britain becoming harder to govern?*. British Broadcasting Corporation.
Lawson, N. (1992). *The view from no. 11: Memoirs of a Tory radical*. Bantam Press.
Letwin, O. (1988). *Privatising the world: A study of international privatisation in the theory and practice*. Cassell Educational.
Levi-Faur, D. (2005). The global diffusion of regulatory capitalism. *The Annals of the American Academy of Political and Social Science, 598*(1), 12–32.
Levy, B., & Spiller, P. T. (1994). Institutional Foundations of Regulatory Commitment: A comparative analysis of telecommunications regulation. *The Journal of Law, Economics and Organizations, 10*, 201.
Littlechild, S. C. (1983). *Regulation of British Telecommunications' profitability: Report to the Secretary of State, February 1983*. Department of Industry.
Littlechild, S. (1986). Economic Regulation of Privatised Water Authorities: A Report Submitted to the Department of the Environment, London: HMSO.
Littlechild, S. (2012). The process of negotiating settlements at FERC. *Energy Policy, 50*, 174–191.
Littlechild, S. (2014). RPI-X, competition as a rivalrous discovery process, and customer engagement—Paper presented at the conference "The British Utility Regulation Model: Beyond Competition and Incentive Regulation?". *Utilities Policy, 31*, 152–161.
Lodge, M., & Stern, J. (2014). British utility regulation: Consolidation, existential angst, or fiasco? *Utilities Policy, 31*, 146–151.
Macmillan, H. (1985). Speech to the Tory Reform Group. Available at: http://www.britishpoliticalspeech.org/speech-archive.htm
Marquand, D. (1992). *The progressive dilemma*. Vintage.
Marquand, D. (1998). The Blair paradox. *Prospect,* May, 19–24.
Marquand, D. (2004). False Friend: The state and the public domain. *The Political Quarterly, 75*(s1), 51–62.
Marquand, D. (2010). *Britain since 1918: The strange career of British democracy*. Hachette UK.
McHarg, A. (1994). The future of consumer representation in the gas industry. *Regulate newsletter*. July edition. London: ICOM.
McKinnon, J. (1993). Conference on regulatory reform: Friction between regulator and regulatee. *Utilities Law Review, 4*(3), 119–120.

McLean, I. (2004). The history of regulation in the United Kingdom: Three case studies in search of a theory. In Jordana, J. and Levi-Faur, D. (Eds.) The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance. *The Politics of Regulation*, 45–66.

Mirrlees-Black, J. (2014). Reflections on RPI-X regulation in OECD countries. *Utilities Policy, 31*, 197–202.

Moran, M. (2003). *The British Regulatory State: High modernism and hyper-innovation: High modernism and hyper-innovation*. Oxford University Press.

Morrison, H. S. (1933). *Socialisation and transport*. Constable.

Newbery, D. M. (1999). *Privatization, restructuring, and regulation of network industries*. Cambridge: MIT Press.

Ofgem. (2001). *Ofgem publishes report from Fuel Direct Working Group*.

Parker, D. (2004a). Editorial: Lessons from privatisation. *Economic Affairs, 24*(3), 2–8.

Parker, D. (2004b). The UK's privatisation experiment: The passage of time permits a sober assessment. CESifo Working Paper No 1 126

Parker, D. (2009). *The official history of privatisation. Government Official History Series* (2 Vols). Hoboken: Taylor and Francis.

Parkinson, J. E. (1995). Corporate power and responsibility: Issues in the theory of company law. Oxford: Oxford University Press.

Prior, J. (1986) *A balance of power*. Hamish Hamilton.

Prosser, T. (2010). *The regulatory enterprise: Government, regulation, and legitimacy*. Oxford University Press.

Pyper, R. (1995). *The British civil service*. Prentice Hall/Harvester Wheatsheaf.

Riddell, P. (1989). *The Thatcher decade: How Britain has changed in the 1980s*. Wiley-Blackwell.

Rutter, J., Sims, S., & Marshall, E. (2012). *The 'S'Factors: Lessons from IFG's policy success reunions*. Institute for Government.

Stelzer, I. (2000). A review of privatisation and regulation experience in Britain. *Institute of Economic Affairs (IEA), Beesley series*. Presentation at London Business School, 7 Nov 2000, Beesley seres of lectures on regulation.

Stern, J. (2003). Regulation and contracts for utility services: Substitutes or complements? Lessons from UK Railway and electricity history. *Policy Reform, 6*(4), 193–215.

Stern, J. (2014). The British utility regulation model: Its recent history and future prospects. *Utilities Policy, 31*, 162–172.

Thatcher, M. (1998). Institutions, regulation, and change: New regulatory agencies in the British privatised utilities. *West European Politics, 21*(1), 120–147.

The Nationalised Industries Policy Group (1977) Report of The Nationalised Industries Policy Group (leaked Ridlye Report). Available online: www.margaretthatcher.org/document110795

Thelen, K. (2003). Institutions and social change: The evolution of vocational training in Germany. In Shapiro, I., Skowronek, S. and Galvin, D. (Eds.), Rethinking Political Institutions. The Art of the State. New York: New York University Press.

Thompson, D. (1988). Privatisation: Introducing competition, opportunities and constraints. In V. V. Ramanadham (Ed.), *Privatisation in the UK*. Routledge Kegan & Paul.

Tombs, S. (2015). *Social protection after the crisis: Regulation without enforcement*. Policy Press.

Vickers, J., & Yarrow, G. (1988). Regulation of privatised firms in Britain. *European Economic Review, 32*(2), 465–472.

Weatherill, S. (2007). The challenge of better regulation. In Weatherill, S. (Ed.), Better Regulation. Oxford/Portland: Hart Publishing (1–17).

Webb, S. (1918). *The new constitution of the Labour Party: A party of handworkers and brainworkers: The Labour programme and prospects*. London: Labour Party.

Yeatman, A. (1987). The concept of public management and the Australian state in the 1980s. *Australian Journal of Public Administration, 46*(4), 339–356.

Yeatman, A. (1996). The new contractualism: Management reform or a new approach to governance?. In G. Devis & P. Weller (Eds.), *New ideas, better government*. Sydney: Allen & Unwin.

Zahariadis, N., & Allen, C. S. (1995). Ideas, networks, and policy streams: Privatization in Britain and Germany. *Review of Policy Research, 14*(1–2), 71–98.

CHAPTER 5

The European Tradition: A Challenge to the Regulatory Orthodoxy?

Introduction

The changing dynamics of environmental politics and policy provide a critical insight into the evolution of UK regulation over the last 150 years. Environmental protection has a long lineage in Britain; dating back to the mid-nineteenth century when the problems of air and river pollution caused by industrialisation in the burgeoning urban conurbations prompted the first official inquiries into the risks of these externalities to public health (Breeze 1993). The prevailing approach to pollution control that emerged in the nineteenth century came to exhibit many of the hallmark features of environmental policy and practice in UK: pragmatic; incremental; reliant on expert (scientific-technical) advice; privileging close (and closed) consultation with affected economic interests; and a preference for informal over juridical regulation (Lowe and Ward 1998). This, in turn, was an important formative influence on the British regulatory tradition.

This chapter critically examines the evolution of UK environmental regulation, with specific reference to the control of water pollution, in the context of the British regulatory tradition. In particular, it considers the challenge of an alternative European tradition, drawing on different legal, political and administrative norms, following the UK's accession to the European Economic Community (EEC) in 1973. It also argues that the emergence of new complex 'wicked' problems, such as diffuse urban

D. Fitzpatrick, *The Politics of Regulation in the UK*,
DOI 10.1057/978-1-137-46199-5_5

pollution, has resulted in a dynamic process that has reanimated some of the traditional tenets of the British regulatory tradition while further confounding others.

The chapter is organised into three sections. The first outlines the notion of a traditional UK policy style in environmental protection, establishing why pollution control in particular came to be seen as a paradigm example of the British regulatory tradition. The second section sets out how British environmental policy and implementation has been challenged from a competing European tradition, in the context of the wider literature on Europeanisation. Particular focus is given to the Water Framework Directive (WFD) (EU 2000) as the central plank of contemporary EU water legislation. The final section examines the interplay of EU and UK law, and the ideas and traditions underpinning both, in the attempts to address the problem of diffuse urban pollution.

The British 'Style' of Environmental Regulation

The notion of a national 'policy style' has been frequently invoked to describe the nature of environmental policy-making and delivery in Britain (Richardson and Watts 1985; Richardson 2013). Traditionally, environmental policy in Britain (or more accurately England and Wales[1]) has been developed in a pragmatic and incremental fashion in response to emergent problems, or, as Lindblom (1959) impressionistically described it, 'the science of muddling through'. This pragmatic, problem-solving approach was seen to be based on the 'accumulated wisdom' of administrators and scientific experts rather than abstract legal principles. Policy-making, in an effort to produce practical, enforceable legislation and avoid open conflict with affected interests, invariably took place in small, closed policy communities that privileged technical and expert knowledge (Greenaway et al. 1992). The ostensibly technical nature of environmental protection was effective in insulating the policy agenda from wider public discussion and debate, which saw it designated as an area of *low politics* (Bulpitt 1986).

In this sense, environmental policy-making resonated strongly with the British regulatory tradition. It revolved around private 'club worlds' of policy-makers, appointed experts and special interests, particularly industry and agriculture, that were focused on reaching negotiated consensus on what was 'fair' and 'decent' (Jordan and Richardson 1982; McCormick 2013). Underpinning this secrecy and limited participation was an inherent conservative notion of responsibility: 'British [environmental]

policy-makers … think of themselves as custodians of the public interest, and feel they can understand the best interests of the public with minimal reference to the public itself' (McCormick 2013: 11).

The ad hoc and informal nature of environmental policy-making meant that the evolution of water quality control in the hundred years after the mid-nineteenth century unfolded in a typically gradual and piecemeal fashion, as layers of common law, statutes, agencies and operating procedures accreted haphazardly over time. Before 1973, a range of environmental duties and functions of public water supply, sewerage and water quality control were divided between over 1600 private and public bodies[2] (Hassan 1996). In negotiating this rather 'confused and confusing medley' (McCormick 2013: 10), local authorities were conventionally afforded a high level of administrative discretion in interpreting and enforcing environmental law. One of the key characteristics of traditional environmental policy and delivery, which marked it out in an otherwise highly centralised polity, was the degree to which decision-making authority was devolved to the local level. In analysing the development environmental policy and regulation in Britain it is imperative to recognise this formative context, where 'there was not even an overall picture of the role and techniques of government let alone an overall view of the environment' (Elworthy and Holder 1997: 53).

Despite the degree of fragmentation and flux in the governance of water resources since the mid-nineteenth century, the overall approach of the various public authorities to implementation and enforcement was marked by a consistency and continuity; in both spatial and temporal terms. An informal system of regulation prevailed, which sought to reach accommodation with economic interests and avoid adversarial conflict and legal action wherever possible. In his study of the UK system of environmental protection, Vogel (1983: 75) concluded that 'if there is any one governing principle of British politics, it is that the British government should make every effort to avoid coercing its own citizenry'. The dominant approach to environmental regulation was characterised by a high level of administrative discretion and malleable strategy on enforcement that eschewed the use of statutory standards and the pursuit of criminal prosecutions in favour of close cooperation between the regulators and regulated (Vogel 2003b). These features of this British regulatory tradition are exemplified in the origins and development of water pollution control.

The regulation of water quality control can be traced back to the establishment of the Royal Commission on the Pollution of Rivers[3] in

1865. The timing of Britain's industrialisation is again critical here: the enactment of the first piece of water quality legislation, the 1876 Rivers (Pollution Prevention) Act, precedes the establishment of full democracy by over 40 years. The absence of a tradition of state intervention and the reliance on common (nuisance) law to control water pollution (Rosenthal 2014) resulted in a cautious piece of legislation that sought to minimise the discharge of sewage and other pollutants into rivers without causing 'serious injury to … (industrial) processes and manufactures' (Cmnd. 3835, 1867: v). The 1876 Act was an attempt to attenuate some of the public health risks of the industrial revolution, while simultaneously protecting the economic growth of those same commercial interests.

The 1876 Act was fatalist in its assessment of the ecological prospects of rivers and the capacity of the state to successfully address their condition. A subsequent royal commission on sewage disposal warned against the imposition of 'costly purification schemes' in communities that relied on manufacturing industries for employment, where 'the character of the river … is already materially, if not hopelessly impaired' (Cmnd. 7819, 1916: 3). In making provision for the enforcement of the law, local authority boards could only give consent to the sanitary authority to commence proceedings on the condition that it was confident that 'no material injury would be inflicted by such proceedings' on any manufacturing industry located within the district (1876 Part III). This opened a crucial distinction between the legal stipulation of the legislation on water quality control and the actual scope for enforcement. This 'implementation gap' between the letter of law and 'a tradition of relatively weak enforcement' (Bernstein 1955) has been a recurring theme of British environmental policy and governance (Richardson 1982; Hutter 1997).

In the British regulatory tradition, the concept of compliance is not a fixed—all or nothing—binary choice determined by statutory law. It is seen as a more nuanced process of negotiation and persuasion that goes beyond describing mere conformity with the prescribed rules (Hawkins 1984). Rather, 'compliance is matter of interpretation: interpretation of rules, and interpretation of facts' (Black 2001). The essence of regulation, in the orthodox view of the regulatory tradition, is not the product of legislators who write the rules, but emergent outcomes of the interactions between the regulators and regulated. It is in this 'regulatory encounter' (Fairman and Yapp 2005), where the conception of compliance is socially constructed by 'street-level bureaucrats' (Lipsky 1980) and those actors with a stake in the regulatory project. Lange (1998) argues that this

constructed compliance departs so far from the perspective of a formal concept of compliance (where the conduct of the regulated is compared to a formal definition of the legal obligation) that attempts to examine compliance, in a strictly narrow sense, are flawed. As Black (2001) observes, officials may consider conformity with the legal minimum as unacceptable and in other instances non-conformity as permissible, contingent on their construction of compliance and interpretation of the spirit of the law.

The relationship between different styles of compliance and enforcement are central to Hawkins' (1984) ethnographic study of pollution control. He invokes two ideal types of enforcement: a 'sanctioning' approach emphasising detection, apprehension and punishment to deter future transgressions; and a 'compliance' approach based on persuasion, negotiation and education. In the sanctioning approach, officials adopt a narrow interpretation of compliance: 'the primary questions are whether a law has been broken and whether an offender can be detected' (Hawkins 1984: 4). This, argues Hawkins, is operationalised through a 'penal' style of enforcement, which is adversarial and accusatory. Conversely, compliance systems tend to be characterised by conciliation and accommodation: negotiation and education, rather than seeking to exact retribution for a discrete violation of the rules, is seen to be a more efficient way to secure a social goal consistent with the broader purposes of the regulatory regime. Hawkins' work provides a 'thick' description (Geertz 1994) of the compliance approach and conciliatory style adopted by pollution control enforcement officers, offering an important articulation of the British regulatory tradition.

At the heart of the British compliance approach to pollution control are two key principles: 'wholesomeness' and 'best practicable means' (BPM). The notion of wholesomeness, as a generic descriptor of safe drinking water, was first enunciated in the Report of the Royal Commission on Water Supply (1866–67). Despite its repeated usage in water legislation, it lacked a clear legal definition or metric measurement as to what exactly constituted 'wholesomeness' (Knill 1998). This stood in contrast to the definition of 'pure and wholesome' in US drinking water regulation; whereas the identification of wholesomeness was based on the expert judgement of professionals, purity could be assessed according to the presence of specific concentrations of chemical compounds (Taylor 1949). The entrenchment of the term 'wholesomeness' as the legal expression of water quality in UK law highlights the inherent aversion in the British model to application of uniform standards for emission limits or particular

industries and sectors. Insofar as standards were set, they were administrative devices to be interpreted locally by officials and rarely had any binding statutory force (Lowe and Ward, 174). This 'contextual' interpretation of what constituted wholesomeness relied upon flexible consents for the control of pollution, which were based on the related principle of BPM.

Although it was formulated with explicit reference to air pollution (in the Alkali Act 1874), BPM came to underpin the approach to all types of pollution control. Never precisely defined, BPM alluded to a general philosophy rather than a clear set of statutory guidelines: 'Under BPM, standards are set for individual polluters by enforcement officers who determine, in their judgement, what is the best that can be achieved given what is technically and managerially possible for that particular polluter' (Conway and Pretty 2013: 526). What was 'practicable' was seen to be contingent upon local 'contextual' conditions, as well as the wider economic climate (Vogel 1986). The marginal position of British courts in regulatory legislation has militated further legal clarification of BPM. The vague conceptualisation of BPM provided for a system of administrative regulation that was to be determined by practitioners on a case-by-case basis, as the accepted arbiters of the full range of technical and financial implications, rather than through the application of general rules or legal standards (Vogel 1986; Hill 1983). Consequently, field inspectors sought to 'tailor' their pollution control requirements according to what was economically reasonable as well as 'technically possible' (Vogel 1986: 80). In such an arrangement, the putative inability to pay for pollution control and abatement became a 'genuine' reason for non-compliance (Hawkins 1984). This economically driven notion of BPM was embedded in the British state's compliance approach to pollution control in the late nineteenth century and early twentieth century, prevailing well into the post-war era. In a debate on the 1951 Rivers (Prevention of Pollution) Act, the then Minister of Housing and Local Government Reginald Bevins, stated:

> I do not disguise for a moment that the fundamental difficulty is the problem of money. So long as we have restrictions on capital expenditure which may prevent the extension of sewage treatment works and people are liable to be exposed to the allegation of causing pollution which could be prevented, then it is thought … that we cannot ignore the fears of those in industry who are concerned lest they are caught between the difficulties of capital restriction on the one hand and prosecution on the other.

In a rare public proclamation on the concept of BPM, the Chief Inspector (Annual Report 1974: 11) of the Alkali Inspectorate reasserted the economic imperative of pollution control, commenting that:

> I have often said, and been criticised for it, that if money were unlimited there would be few problems of air pollution control which could not be solved technically. In this statement can be included the supply of manpower and material resources. We have the technical knowledge to absorb gases, arrest grit, dust and fumes, and prevent smoke formation. The chief reason why we still permit the escape of these pollutants is because economics are an important part of the word 'practicable'. A lot of our problems are cheque book rather than technical, and attitudes which take little account of the economics of scarce resources, on which there are many claims, can so easily get priorities out of perspective.

The exact determination of BPM was a matter to be negotiated privately between inspectors and individual emitters (Hill 1983). The achievement of consensus amongst this small group of actors on what constituted BPM was the ultimate aim: 'The chief inspector makes the final decision on any standards and other requirements, for he is ultimately responsible, but this only follows mutual discussions with industry representatives, whose approval is gained if possible' (Alkali Inspectorate, Annual Report 1974: 12). The organisational culture of the regulatory agencies engaged in pollution control was one in which secrecy was privileged and public consultation limited. The disclosure of information on permits, the operationalisation of BPM and prosecution details were all highly circumscribed (Hill 1983).

The flexible nature of BPM enabled it to adapt and evolve not only across different local circumstances, but also over time. This adaptability and gradualism is seen in Whiggish terms as a key advantage of the British approach to pollution control. The fluid and elastic conceptions of compliance that British officials operate with are seen to be suited to the continuing and dynamic nature of water as a natural resource and the open-endedness of the problem of pollution (Hawkins 1984: 108–109). Its pragmatism, incrementalism and expedience was defended by both state and non-state actors ensconced in the field pollution control as a process of learning 'over nearly two centuries … in which impracticable ideas have been eliminated, utopian aspirations have been discarded, and the policies which have survived have been proven to work' (Ashby and

Anderson 1981: 153). As such, BPM was imbued with an 'ageless' quality, which saw it naturalised as the common-sense approach to pollution control (Hill 1983). The Chief Inspector of the Alkali Inspectorate (1974: 8) claims:

> I have heard it said by a well-known authority from abroad, who has studied the international environmental control scene very carefully for the last 17 years, that when one applies all the so-called modern concepts of control, attempting to apply scientific principles and ideas on a grand scale, making use of computers, telemetering, air quality criteria, etc., one finally ends up with BPM.

The underlying principles of wholesomeness and BPM afforded officials and inspectors a huge degree of administrative discretion in adapting control requirements and deciding which offences warranted prosecution (Hawkins 1984). As a result, environmental regulation in the UK has been permeated with uncertainty as a corollary of flexibility; where rules and laws do exist there has been a steadfast reluctance to enforce them (Hawkins 1984; Vogel 1986).

The flexibility provided by this highly discretionary regulatory regime gave rise to a system of self-regulation, which sought consensus and conciliation with vested economic interests and the publicly owned water suppliers. Indeed, a series of radical criminology studies (Pearce and Tombs 1990; Croall 1992; Box 2002) critiqued the sanguine view that the British style of enforcement offered an efficient approach to securing compliance and progress. Instead, they argued that view propagated by Hawkins neglected the wider political economy and failed to recognise that compliance-based regulatory regimes are effectively 'captured' by dominant interests.

This theory of 'regulatory capture' has been applied to UK water pollution control (Hassan 1998), due to the clear conflict of interest created by the integration of operational and regulatory functions within the same public body: the regional water authorities charged with monitoring and regulating water pollution were themselves large polluters. In this institutional arrangement it is unsurprising that the disavowal of rigid environmental standards and tough sanctions endured into the post-war era. Reflecting upon the implications of the conflict of interest in the local authority boards, one Labour MP commented: 'I do not think that anybody can feel that either the local authorities or industrialists

will be unfairly treated by the river boards upon which they have such strong and powerful representation' (HC Deb 19 May 1958 vol 588, c1046). Without the financial resources to invest in infrastructure modernisation the supposed ideal of 'flexible enforcement' (Bardach and Kagan 1982), which characterised British pollution control, was abused in order to ensure the pretence of compliance: by the end of the 1970s, the regional water authorities with 'no misgivings or opposition from the DoE [Department of Environment]', were 'stage-managing reviews' and adjusting consents to reflect the slow process of modernisation of the sewage treatment works, which were still in public ownership (Hassan 1996: 113). In addition to government inertia, the influence of industry in the area of pollution control also acted as powerful restraint on ecological improvement. For example, the implementation of the 1974 Control of Pollution Act (COPA) Part II, which had extended consent permits to all British waters, was delayed for over a decade, in order to enable key industrial stakeholders to lobby the government to tailor the consent conditions to fit their requirements rather than the quality standards of the receiving waters (Hassan 1996: 109).

Accommodative and conciliatory nature of the regulatory regime for water quality, established in mid-nineteenth century and consolidated in the first half of the twentieth century, was subject to increasing challenge from the 1950s. In the post-war era, the consequences of the failure (whether real or perceived) to enforce the law on pollution control became more acute and a matter of political and public controversy. The 1950s and 1960s witnessed an expansion in the environmental movement, as groups such as the Civic Trust and the Council for Nature were established, as public concern for the value of amenity and wildlife conservation grew (Macnaghten and Urry 1998). This new-found emphasis on the conservation of natural resources built on the advocacy of existing anti-pollution groups, such as the Pure Rivers Society and the Central Council for River Protection, which were formed in the inter-war years (Lowe and Goyder 1983). The focus of environmental lobbying shifted from specific pollution incidents involving individual landowners or factories to the responsibility and accountability of central government as the growth of the state post-war saw it take an increasingly interventionist position on the management of natural resources, wildlife and the countryside. While the focus was often on the protection of the rural landscape, through the creation of the Nature Conservancy and the National Parks Commission, the post-war Labour government was also concerned that the quality of

life for the urban working class was under threat from the 'abuse and destruction of our rivers' (Sheail 1993).

These marginal adjustments to the system of water pollution control in the 1950s and 1960s proved inadequate. By the early 1970s more fundamental reform was called for. The first Report of the newly created Royal Commission on Environmental Pollution, claimed the 'pollution problem' was attributable to the accommodative style of enforcement: 'Legislation often fails in its purpose not on account of inadequate laws, nor through lack of technical knowledge, but because the laws are not being enforced' (Cmnd. 4585, 1973, para. 1).

The disquiet about the water quality preceded a number of organisational reforms to the governance of water in England and Wales. The 1973 Water Act supplanted the municipal system of governance with a new structure of ten large multifunctional water authorities based regionally around rivers basins. This structural reform was designed to integrate the various operational (namely the supply of water and disposal and treatment of sewage) and regulatory functions of water resource governance on an institutional basis that was more aligned to the natural hydrological system of the river basin; a transformation that Day and Klein (1987) describe as a 'monument … to technocratic rationality'. As such, the Water Act 1973 represented a nascent attempt to institutionalise integrated water resource management. As well as being integrative, the legislation was also centralising, bringing the water authorities more clearly under ministerial control[4] (McLoughlin and Forster 1976).

By the end of the 1980s it was estimated that an investment programme of approximately £30 billion in the water and sewage infrastructure was needed to improve water quality in England and Wales in order to meet European directives. In the context of a Conservative government determined to bring down the budget deficit and a wider programme of public utility privatisation, such a sum, claimed David Trippier, the then minister of the Environment, 'would never be extracted from the Treasury' (cited in Hassan 1996: 115). The application of instruments of central financial control by the Thatcher government, namely the external financing limit, to public utilities hit the water sector especially hard having been already starved of investment in the previous decade. Total capital expenditure in water and sewerage between 1973 and 1983 had fallen by over 40%, with the sector bearing significant cutbacks following the OPEC oil crisis in 1973 and the subsequent economic downturn (Hassan 1996). These financial strictures were seen to result in a substantial decline in the

standards of water quality in the 1980s (Lynk 1993), which were linked to adverse public health outcomes: Parker and Sewell (1988: 781–782) argue that a three-fold increase in the number of cases of dysentery and diarrhoea were partly attributable to the deterioration of water supply and sewerage infrastructure.

Despite the divestiture of public assets, the privatisation of the water industry actually resulted in a centralisation of regulatory and management functions and a move away from the principles of integration.[5] Privatisation had been preceded by a gradual replacement of local authority representatives on RWA boards with more commercial-minded business managers appointed by central government, which served to transform the organisational culture of the authorities from an ethos of collective provision to a market-orientated approach focused on efficiency and value for money (Parker and Sewell 1988). This process, enabled by the 1983 Water Act, brought the water industry more firmly under central control, with direct line of responsibility to the Secretary of State at the DoE. In this sense, privatisation was only made possible, counter-intuitively, by fully 'nationalising' the water sector under the control of central government.

Privatisation of the water sector, while drawing on the neoliberal rhetoric of decentralisation and consumer sovereignty (see Chap. 4), represented the assertion of a much more hierarchical, top-down model of governance. Privatisation was seen to usurp the dominance of planners and engineers, who had enjoyed virtually exclusive power over water resource management in the post-war period (see McCulloch 2009). However, privatisation simply substituted one set of technical experts for another: namely management consultants and economists. While Hayekian neoliberals may have celebrated the passing of the 'master planners', the governance of water in England and Wales continued to privilege technocratic expertise in line with the British regulatory tradition: supplanting the paradigm of (national) civil engineering with the enterprise discourse of the free market 'movers and shakers' (Mulholland 2002: 82). As McCulloch (2009: 474) argues, after privatisation, 'water is … [still] treated as a simple commodity torn from its organic interconnections with society and the environment … with innovations led by a special interest group, this time emphasising market (economic) rather than structural (engineered) solutions'. Managers, like engineers before them, do not 'ask for confirmation of a hypothesis, but … ask whether there is an enforceable technical proposal for dealing with a pollution problem and then ask whether policy can be built around the solution' (Weale 1992: 83). However, the shift from

a 'professional' public bureaucracy to a more managerial state did arguably have an impact on the construction of both the 'problem' of water quality control and the 'viability' of particular solutions; the tendency to privilege budgetary concerns (Niskanen 1974) and political windows of opportunity (Aberbach 2001) becomes greater in the managerial (public choice) perspective.

The post-war period was a turbulent time for environmental regulation. The traction of different ideas—integration, marketisation, regulatory independence—waxed and waned. Key aspects of the British regulatory tradition were challenged in the process of reform. However, at a macro-level the key changes were structural and juridical: the practice of environmental regulation became much more centralised and legally formalised. This period of institutional 'hyper-innovation' (Moran 2003) was catalysed by the UK's integration into the EU and the impact of an alternative European tradition. For example, the decision to privatise the water industry was influenced by the incursion of European environmental policy and standards into the strategic thinking and fiscal calculations of the British government. While the Conservatives were inclined to proceed with privatisation in any case, the demand for capital investment created by European directives and in anticipation of more to follow certainly sealed the fate of public ownership of water (Hassan 1996: 114–115).

However, the picture is more nuanced than some of the Europeanisation literature suggests. The programme of reform and transformation in environmental policy and regulation was mediated by the ideational context of the dominant regulatory and political traditions. At times these two dominant paradigms were aligned (as in the preservation of administrative discretion) and at others they were in tension (e.g., with regard to the centralisation of regulatory function to the regional and then national level). The result is a complex ideational environment in which particular ideas resonate asymmetrically, according to not only exogenous competing traditions but also the interplay between the dominant regulatory and political paradigms.

The European Tradition

The European 'regulatory state', as Majone (1994) conceptualised it, tends to confine itself to the creation of a framework of rules that are implemented disparately in the different national contexts (Moran 2003). EU environmental law, and water policy in particular, has been at the vanguard of this

emergent European regulatory state. The network of actors involved in EU water policy has proliferated over time, evolving from a system of relatively private and limited participation to a more open, public and conflictual style of decision-making (Maloney 1994). The process of Europeanisation, however, is not unilinear. In areas of shared competence, such as the environment and climate change, EU policy is still heavily influenced by the culture, agendas and actions of individual Member States (Lowe and Ward 1998). Analysis of European integration (Bulmer and Jeffery 2010; Olsen 2003) has showed that Member States are involved in an iterative relationship with the EU, adapting their distinctive national styles of policy-making rather than being subsumed within the broader 'European tradition'. EU water policy offers a useful case study for analysing the impact of a competing European tradition on the British regulatory tradition.

In its relations with the EU, Britain has often been depicted as the 'awkward partner' (George 1998). A range of unique characteristics, including the imperial legacy of the British Empire, the putative 'special relationship' with the USA, and a geographical separation from continental Europe, is viewed as giving rise to an 'island mentality' and an inbuilt scepticism of the underlying principles and ideals of the European project (Lowe and Ward 1998). The UK's late accession to the then EEC some 16 years after the signing of the Treaty of Rome in 1957 is both a reflection and a contributing factor to the British sense of 'otherness' to the European project. This general awkwardness and hesitancy to European integration has not resulted in outright isolationism; Britain has engaged with the EU on an inconsistent and variable basis to further its interests while stopping short of making a full commitment to the goal of 'an ever closer union among the peoples' of Europe' (European Union 1957). The nature of relations between Britain and the EU are encapsulated by speech from Winston Churchill in 1946, in which he declared: 'We are in Europe, but not of it … We are interested and associated, but not absorbed' (Churchill 1946).

The fractious (and factious) nature of the British–EU relations is partly attributable to a disjuncture between two alternative traditions of legal doctrine: common law and civil (Roman) law. The former, which is prevalent in the UK, involves the interplay of precedent and pragmatic adjustment to new circumstances over time, whereas the latter emphasises the application of explicit and precise rules. This, in turn, draws upon the continental tradition of *Rechtsstaat*, derived from the Franco-German axis at the heart of the European project (Pierre and Peters 2003). While legal scholars point to the sui generis quality of EU legal culture, based

on the emergent features of the different Member States, these different conceptions of the role of law have given rise to divergent types of policy-making and governance. A stress on the use of common law is central to the British regulatory tradition. The continental tradition of regulatory policy-making and governance, on the other hand, can be characterised as 'fluid, open, network-based, rule-guided, sectorised, and subject to significant inter-institutional bargaining' (Bulmer and Jeffery 2010: 79). The fluidity and openness of the EU relates to the multitude of entry points the European Commission provides to external actors to influence decision-making. This open opportunity structure often results in shifting policy agendas and networks as new actors enter the fray (Mazey and Richardson 1992). While the network-based aspect reflects a 'melting pot', or 'garbage can' (Cohen et al. 1972), of different national perspectives and policy styles, the rule-bound, legalistic character of the EU remains evident.

Despite the prevalence of this European tradition of law and policy-making, the EU has not fostered a shared administrative culture, or what Olsen (2003) calls the 'European administrative space', across Member States. There is no policy or treaty base for a particular European model of public administration; historically, the EU has assumed that a variety of national administrative traditions is legitimate and compatible with ongoing European integration (Olsen 2003). The protection of national administrative autonomy has led to a predilection for regulation as the key mode of EU governance. Member States have general preferred legislative instruments, invariably directives, which afford national governments administrative discretion over how to implement and enforce EU rules and obligations.

In enabling Member States the flexibility to shape EU laws according to national contexts, directives are seen to operationalise the concept of subsidiarity. The consequence being that, national administrative traditions and their level of embeddedness exert significant influence on the implementation of EU legislation (Knill 1998). This reliance on national administrations for the transposition and application of EU law has resulted in an 'implementation deficit' in many policy areas, including environmental protection. Moreover, European integration is not one-way traffic; Member States seek to impose their own regulatory traditions and ideologies at the European level, via lobbying of the Commission (Demmke 1997). Nevertheless, environmental policy and governance is often identified as an affirmative case of *Europeanisation* (George 1998;

Bache and Jordan 2006; Windhoff-Héritier 2001). Radaelli (2003: 30) defines Europeanisation as the

> Processes of (a) construction, (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic discourse, identities, political structures and public policies.

It is widely held that European integration has had a pervasive impact on the environmental politics of Member States, in terms of: posing a challenge to the national styles of policy-making and implementation at the national, regional and local level; expanding the constellations of actors involved in the policy arena; and, more contentiously, on the ultimate policy and ecological outcomes (Jordan and Liefferink 2004). In studies of UK–EU relations specifically, it has been claimed that environmental policy agenda, and the style and nature of its implementation and enforcement, has been thoroughly and irrevocably Europeanised (Lowe and Ward 1998), arguably to a greater extent than any other policy domain. The majority of UK environmental law, as well as the rights and recourses available to groups and individuals to seek redress, is now derived from EU legislation (Fisher et al. 2013). The nature of EU environmental law, moreover, has been fluid and dynamic, evolving from a narrow focus on the harmonisation of product standards in the common market, to a much more comprehensive scope on the regulation of air, water, land, waste and the emergent grand challenges of climate change, biodiversity and energy security (Kramer 2002). The transformation of environmental policy from a purely domestic policy arena to a distinctly European context has had profound implications for the dominant understandings of the British regulatory tradition, as well as environmental politics.

As noted above, environmental policy and enforcement came to represent the paradigm example of the British regulatory tradition. Challenges to this traditional style of environmental regulation from the EU have consequences for the viability of such an approach to regulation in other key policy areas (such as food safety and consumer protection (Vogel 2003a). The UK's accession to the EEC in 1973 coincided with the launch of the First Environmental Action Plan. Prior to this, environmental protection had been a peripheral concern of the European project, which had concentrated on the 'harmonious development of economic

activities and a continuous and balanced expansion' in the period of post-war reconstruction (European Union 1957: Article 2). In fact, until the passage of the Single European Act in 1986, there was no legal basis to the principles and objectives guiding environmental policy at the European level. As a result, environmental directives tended to be justified according to principles of public health protection, or the harmonisation of pollution control to avoid market distortion. Examples of water use directives aimed at public health protection include the Drinking Water Directive (CEC 1975) and the Bathing Water Directive (76/160/EEC), which imposed a limit of the level of contaminants for drinking and bathing waters. The European Commission had to, in the words of a former DG for the Environment, Consumer Protection and Nuclear Safety, 'cleverly interpret the Treaty of Rome' in order to avoid accusations of ultra vires in the area of environmental protection and conservation (cited in Caulfield 1981: 417).

The attitude of successive UK governments to European environmental policy had been one of (moral and political) ambivalence; or as Chris Rose, a former director at Greenpeace UK, put it, 'a recipe for fudge and smudge, a quagmire of intellectual fuzziness and licence for administrative laxity' (1990: 4). As discussed above, environmental policy had traditionally been cast as distinctly low politics in Britain, with much of the responsibility for its organisation and implementation delegated to local authorities, semi-independent inspectorates and more latterly quangos, such as the Environment Agency. Although a centralisation of functions and competence was underway in the 1960s and 1970s, environmental policy was not considered to be the preserve of central government. Inevitably, this indifference for domestic environmental affairs was transposed to the European level, forgoing the opportunity to influence the development of European environmental policy from its inception (Lowe and Ward 1998). Somewhat perversely, the UK's lack of engagement in this area was underscored by a Whiggish belief in the superiority of the domestic systems for environmental protection and pollution control already in situ. British officials, and to a lesser extent environmental lobby groups based in the UK, considered Britain to be a 'world leader in the protection of the environment' (Caulfield 1981: 416). Representatives of British industry also extolled the virtues of flexibility and consultation at the heart of the British regulatory tradition, with the CBI wishing to see 'the [British] sort of flexible system … more prevalent throughout the EEC' (European Communities Committee 1981). In keeping with the

Whiggish interpretation of history, British expertise in environmental protection and pollution control was to be exported to continental Europe as best practice. Capturing this sentiment perfectly, the chairman of the planning and transport committee of the Association of County Councils proclaimed that 'we in England are already on the right lines … Europe must learn from us. They copied us in order to have parliaments so perhaps they has better adopt our planning system' (cited in Caulfield 1981: 416).

The challenge of an alternative European tradition of environmental protection compelled the UK authorities to explicitly articulate the distinctive advantages of the 'British approach'. It was in the negotiations on water pollution measures, where some of the first official explicit statements of the British regulatory tradition can be found. From the mid-1970s, UK authorities, at the local and national level, were at odds with the European Commission about whether pollution control measures should be based on uniform emission standards (UES) or environmental quality objectives (EQOs). The UES approach, favoured by the Commission, sets limits for the concentration of dangerous contaminants in the effluent at source, without factoring in the capacity of the receiving environment to 'safely' absorb levels of pollution (Harrison 2001). The EQOs, which the UK lobbied for, set emission limits contingent on the dilution capacity and specific function (such drinking water abstraction, fishing or bathing) of the receiving water body. As an island surrounded by a seeming abundant capacity for the absorption of pollution, UK authorities argued that the UES approach unfairly disadvantaged British industry and conflicted with the traditional approach of pollution control to 'discharge and disperse'. Sir Eric (later Lord) Ashby, a renowned botanist and the first chairman of the Royal Commission on Environmental Pollution, argued that the UES approach signalled a move away from giving 'authorities responsible for administrating the legislative discretion to adjust what are really permits to pollute according to the circumstances of the place and time and industry or corporation concerned', which threatened 'the lessons we have learned from 160 years or our history'. As Lowe and Ward (1998: 19), 'Britain's "traditional" approach came be defined, in reaction to the incursions of the EC environmental policy making'.

In an attempt to embed the prevailing regulatory tradition the UK authorities sought, somewhat counterintuitively, to formalise key 'non-principles' of the British approach, such as flexibility, pragmatism and discretion (Lowe and Ward 1998: 18). In a highly paradoxical fashion, the British state was instigated in taking a more explicit stance in support of

the moral and political ambivalence of the British regulatory tradition. The process of Europeanisation, and the challenge of an alternative European tradition, has in this sense entrenched attitudes and deepened the sense of attachment to the British regulatory tradition, which had been previously viewed as 'natural' and organic. This attachment to traditional principles and values was not universal, however. The tenth Report of The Royal Commission on Environmental Pollution (1984), which had previously been key advocate of the 'British philosophy' (1984: 41), argued that the UK authorities' approach to negotiations (over issues such as the UES vs. EOS debate) had been unnecessarily antagonistic and premised on 'artificially entrenched positions', which despite 'the proclaimed virtues of flexibility, were in danger of being translate into dogma' (1984: 48).

The combative stance of the UK authorities to European integration (coupled with the broader Eurosceptic rhetoric of the Thatcher administrations) prepared the way for a series of clashes with fellow Member States and the Commission over environmental policy during the 1980s and 1990s (Ward et al. 1995). A decline in measures of water quality served to undermine Britain's innate sense of superiority on environmental protection and provided a powerful argument against its preference for an incremental, prudent approach. The long-term upward trajectory in water quality from the end of the 1950s was arrested in the 1980s; between 1985 and 1990 there was net deterioration of 3.6 % in the water quality of rivers in England and Wales (Royal Commission on Environmental Pollution 1992). After little more than a decade of European integration, the reputation of Britain had been transformed from a 'market leader' in environmental protection to 'The Dirty Man of Europe' (Porritt 1989).

The politicisation of the environment, facilitated by the political voice given to British environmentalists at the European level, threatened to derail the process of European integration in more conventional areas of high politics, such as trade and economic growth. However, the 1990s witnessed a period of convergence between Europe and the UK, as the Commission sought to consolidate rather than expand its existing environmental policy agenda and the British government under John Major made a concerted effort to restore its international reputation on environmental protection (Lowe and Ward 1998). Hence, the increasing European dimension to environmental policy during the 1980s and 1990s contributed to the trend towards centralisation of policy-making and regulation, which resulted in central government taking a more strategic approach to environmental protection. Analogous to the other aspects of European integration, the UK's

stance on EU environmental law move from 'slow adaption' in the 1970s to 'semi-detachment' and resistance in the mid- to late 1980s through to a period of re-engagement and cooperation in the 1990s.

An example of the UK's more engaged disposition to European environmental policy is provided by the development of the national and EU regulatory regime for integrated pollution control (IPC). The Environment Protection Act 1990 introduced an integrated system of pollution control to address the fragmented nature of environmental protection, in which there were different systems for controlling land use, one for water pollution, another for waste, and so on (Malcolm 1994). Despite its reputation as an environmental laggard in the 1970s and 1980s, the UK was a pioneer in this new area of 'holistic' environmental regulation. Following its early adoption of this cross-media environmental regulation, the UK went on to play an instrumental role in the European Commission's decision to launch a formal proposal for an EU-wide directive on IPC. This more proactive strategy to Europeanisation by the British state enabled it to decisively shape some of the key principles underpinning this new European regime on IPC.

Under the 1990 Act, IPC operated according to the key principle of 'best available techniques which do not entail excessive cost' (BATNEEC). As such, the legislation preserved the high level of administrative discretion in the British model, maintaining that 'It is for the individual inspector to fix conditions which will ensure the BATNEEC principle is satisfied' (Malcolm 1994: 151). The BATNEEC principle is derived from the notion of 'best practical means', which was underpinned by the Alkali Acts (1863, 1881, 1892 and 1906) and further consolidated in the COPA 1976. The key role played by the UK in shaping the EU regime on integrated pollution control was important in securing 'best available techniques' (BAT) as the key legal obligation of the European integrated pollution prevention and control (IPPC) Directive (1996/61/EC), and the current industrial emissions Directive (IED), which superseded the IPPC Directive in 2010. The principle of BAT draws on the target-setting approach of US environmental regulation, particular the 1970 Clean Air Act and the 1972 Clean Water Act (Flynn and Baylis 1996). As such, the degree of explication and codification involved in setting the criteria for determining BAT is far greater than under BPM. The nature of the decision-making is also much more formalised, with negotiation over the criteria for determining BAT being operationalised through the Information Exchange Forum (IEF), which comprises representatives of the Member States, representatives of

affected industries and environmental non-governmental organisations (NGOs) (Fisher et al. 2013). In this regard, BAT offers 'the potential to be a technology-forcing measure facilitating higher standards of pollution control' (Flynn and Baylis 1996: 321). The essential rationale (in the British case) underpinning both remains broadly similar, however. BAT, like BPM before it, remains guided by a pragmatic philosophy that seeks to find viable solutions to ecological problems that takes into consideration the technical, economic and practical constraints. Moreover, although discussion of BAT takes place in the IEF between officials from Member States, industry and environmental NGOs, this is a rubber-stamping procedure rather than a deliberative process. The IEF, which is chaired by the DG for Environment, confers political approval to the scientific and technological elaborations of BAT provided by the technical working groups (TWGs). The UK, together with other Northern European states such as Netherlands and Germany, has proved to be a particularly 'vociferous and influential' actor in the TWG decision-making (Lange 2008).

The development of a regulatory regime for IPC represented part of a broader shift to new forms of environmental governance at the UK and European level. Broadly speaking, traditional approaches based on sectoral, command-and-control regulation have been discredited as effective solutions to complex environmental problems. In their place, both theorists and practitioners and activists have advocated more inclusive perspectives and approaches that recognise the trade-offs across different natural and anthropogenic systems involved in making decisions about the costs and benefits of different environmental policies. Invariably these approaches also seek to foster greater participation around stakeholders and citizens. These more holistic and participatory paradigms have gained particular traction in the study and practice of water resource regulation and management. The following section explores the impact of these new paradigms and their practical manifestations on the British regulatory tradition through a discussion on the WFD.

New Forms of Environmental Governance: 'Old Wine in New Bottles'?

There is general agreement that the greatest challenge to securing water quality today is characterised by institutional and organisational obstacles rather than technical or scientific knowledge gaps (Moss et al. 2009). The movement for more effective water governance has been based on the

paradigm of integrated water resource management (IWRM). IWRM advocates a multidimensional approach to water resource management: multifunctional, multisectoral, multilevel (see Moss et al. 2009). The policy discourse of IWRM was disseminated in two key documents at the turn of the millennium: the 'World Water Vision' (WWC 2000) and the 'World Water Security: A Framework for Action' (GWP 2000). The former offered an account of the global water challenge and the latter a blueprint for addressing it; taken together, the two documents put forward a model for a global water regime. The model of water management was based on a set of norms and prescriptive rules and standards, including:

> a holistic approach that links socioeconomic development to environmental protection; water should be valued as a scarce economic resource; an adequate supply of water should be seen as a basic human need; transparency and public participation should be the hallmarks of water decision-making; shared river basins should be governed cooperatively through international agreements. (Conca 2006: 2)

The shift to IWRM can be seen as recognition of water resource management as a 'wicked' problem, arising largely from the interplay of a multiplicity of stakeholders with conflicting preferences and the incomplete, uncertain and contradictory understanding of the problematic system (Rittel and Webber 1973). In order to manage water resources sustainably, advocates of IWRM claim that integration is required between the varied perspectives of scientists, between the multiplicity of stakeholders and their conflicting preferences and also between scientists and stakeholders to ensure both of their 'voices' are heard (Hearnshaw et al. 2011).

The paradigm shift in water resource management to more decentralised, polycentric governance (Ostrom 2001; Gleick 2003) reflects the wider debates on the supposed shift from 'government to governance' (Rhodes 1997). In the UK, as in many advanced industrial societies, the transition towards polycentric sustainability strategies has been linked to the creation of stakeholder networks that promote broad acceptance of shared environmental strategies, or what has been called 'social learning' (Head 2010; Pahl-Wostl 2007; Pahl-Wostl et al. 2007). It is networks rather than regulation (hierarchy) or markets that have been forwarded as the mechanism of enabling such social learning. In these networks or 'communities in practice' (Pahl-Wostl et al. 2007), stakeholders at different scales are connected in flexible relationships that allow them to develop the capacity and trust they need to collaborate in a wide range of formal

and informal relationships ranging from formal legal structures and contracts to informal, voluntary agreements. Networks, therefore, are seen as appropriate for the management of complex tasks or problems: they are considered to be flexible, efficient and innovative organising hybrids that enable participants to accomplish something collectively that could not be accomplished individually (Powell 1998). The origin of these networks is not uniform: they may evolve gradually to govern a shared resource or evolve to deal with impending problems; they may be initiated by mandate or regulatory requirement; or they may be 'crafted' by entrepreneurial managers to accomplish resource sharing and enhance programme performance (Weber and Khademian 2008: 334).

What remains ambiguous, however, is how effective the collaborative and participatory prescriptions of IWRM and social learning are at tackling complex environmental problems. The application of 'environmental quality standards' (EQS), as parameters of water pollution, via EU law brought the water quality of aquatic systems in the UK (as well as other Member States) into sharp relief (Novotny and Olem 1994). In 1985, only 10 % of rivers in England and Wales were considered to be of 'poor or bad class'; the introduction of the general quality assessment (GQA) measure of water quality in 1990, however, saw the proportion of rivers in England that were achieving 'good or very good chemical status' fall to 55 %. This promoted two decades of major investment in addressing UK water quality levels. Since 1989, it is estimated £68 billion has been spent on improving water quality and infrastructure by the (privatised) water industry (Water UK 2010). A significant proportion of this investment has been focussed on reducing the impact of pollution on surface and groundwater. In addition, the Environment Agency (EA) spends around £140 million each year on tackling issues of water pollution (NAO 2010: 15). However, despite these major programmes of investment, around only 27 % of surface and groundwaters are attaining good chemical and ecological status under the new monitoring system introduced as part of the EU WFD.

Diffuse water pollution (DWP), which includes both rural (mainly agriculture) and urban sources (a plethora of sources ranging from contaminated road run-off to domestic pollutants from misconnected waste water plumbing), is seen as the key explanation underpinning this phenomenon. DWP is not a 'new' problem as such; the risks of non-point sources of pollution, which include both organic matter (such as sediment, soluble nutrients) and hazardous materials that are the by-product of anthropogenic

activity (hydrocarbons from vehicle emissions, salt from road de-icer, herbicides and pesticides), have always been present to some degree. Indeed, it was only with the development of modern industrial society that water pollution became identified with particular point sources, such as waste water treatment plants, which were introduced to remedy some of the public health problems caused by lack of sanitation and suitable drainage in the urban sprawl (Sheail 1993). The risks of DWP, therefore, have only become apparent (again) in the late modern era after the more obvious externalities of industrialisation were attenuated.

The sources of DWP are small but numerous and often lacking ownership, with significant cumulative costs (estimated to be approximately £1.3 billion per annum [NAO 2010]). The regulatory regime created after privatisation vastly underestimated the degree of complexity involved addressing water pollution. As recently as the late 1980s, Day and Klein (1987: 150) were confident in asserting that 'water is low on uncertainty. The relationship between inputs and outputs is clear … it is a service in which specific objectives can be set and achievement against those objectives can be monitored both qualitatively and quantitatively.' The problem of DWP presents a number of distinct technical, governance and regulatory challenges. The non-specific nature of diffuse water pollution, which is distinguished from pollution that can be traced back to an identifiable point-source (such as a sewage outfall), means it is often cast as the archetypal 'wicked problem': complex, open-ended and intractable (see Allen and Gould 1986; Conklin 2006; Head and Alford 2008). Wicked problems are characterised by their complexity: they are considered dynamic and uncertain, contested in terms of legitimate values and interests, involving many externalities and multiple trade-offs, which are intractable for a single organisation (Rittel and Webber 1973). The challenges of DWP are particularly acute in an urban setting, where issues of fragmentation, contestation and ownership are even more pronounced; contributing factors range from road run-off, involving car manufacturers, the Highways Agency, local authorities and water companies amongst others, to the misconnected drains of individual householders.

Increasing sensitisation to the problem of DWP was one of the key drivers of the EU WFD. The WFD emerged out of discursive context at the European level about the need to introduce environmental legislation across the EU to safeguard the ecological quality of all waters. This followed the failure of directives focused on the wider environmental objectives of diffuse sources of water pollution, such as the Nitrates Directive,

to induce satisfactory compliance. Member States with stringent national environmental standards, such as Denmark and Germany, along with the European Parliament emphasised the historical successes of environmental directives and argued that there was a need to improve and extend implementation to create a 'level-playing field' for environmental standards and to tackle increasing pollution of waters, and especially groundwater, from diffuse sources. Other Member States, such as France and UK, called for greater deregulation and decentralisation of water resource management, emphasising the high costs entailed in the drinking, bathing and waste water directives (Kallis and Butler 2001).

In this climate of contestation, a process of consultation on the need for a more encompassing directive on the ecological quality of waters (CEC 1993) was initiated. Whereas, previous directives had tended to focus on specific bodies of water (such as those identified for drinking water abstraction or generally used as bathing areas) the implication here was that ecological protection should apply to all waters. A Commission Communication was formally addressed to the Council and the European Parliament, but at the same time invited comment from all interested parties, such as local and regional authorities, water users and NGOs (CEC 2011). A key theme of the consultative process was the need to introduce a single piece of framework legislation, which integrated the water policy arena that was fragmented both in terms of objectives and means. The process, however, embraced the difficult task of reconciling a number of divergent perspectives and demands: 'regulatory simplification vs. comprehensiveness, deregulation and reduction of costs vs. tougher and new ecological standards, decentralisation of action vs. improved implementation' (Kallis and Butler 2001: 129). An outcome of this process was the Commission's Proposal for a WFD with the following key aims:

- expanding the scope of water protection to all waters, surface waters and groundwater
- achieving 'good status' for all waters by a set deadline
- water management based on river basins
- 'combined approach' of emission limit values and quality standards
- getting the prices right
- getting the citizen involved more closely
- streamlining legislation

All of these aims were incorporated into the EU WFD, which was adopted in December 2000 and transposed into English law in 2003. The WFD sets a number of objectives to protect and enhance the ecological and chemical status of aquatic ecosystems, with regard to the absence of damaging pollution as well as the sustainable flow and recharge of both surface waters and groundwater. The WFD is a comprehensive piece of EU legislation that represents a move away from the segmented and sectorised approach to European environmental policy that has previously dominated the Commission. It is inclusive of both water quality and quantity (i.e., flooding and scarcity), covers the full range of non-marine water bodies (including coastal waters and groundwater, as well as inland surface water) and diffuse and point-source pollution (Fisher et al. 2013). The WFD also seeks to enhance the strategic integration of other regulatory areas, such as fisheries, navigation, transport, energy, tourism, regional policy and critically the Common Agricultural Policy (CAP), that impinge upon water quality at the European level (see Articles 16 and 17). In this sense, it is seen to represent a shift from the putative command-and-control approach to more holistic conceptions of water governance. As such, the WFD is underpinned by the principle of IWRM. It is centred on the need to manage water across whole river basins, to encourage greater and broader participation in decision-making processes, to make water management more transparent and accountable, to raise the cost-efficiency of water infrastructure investments (Moss et al. 2009).

The two themes at the heart of the WFD are a reconfiguration of the scalar organisation of water management and an emphasis on procedur-alisation, particularly on the role of the public in the decision-making process (Hüesker and Moss 2015). One of the major innovations of the WFD was that it institutionalised the river basin as the optimal unit of governance for water resource management (Kallis and Butler 2001). A river basin can be defined as 'the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta' (Article 2[13]). The WFD therefore seeks to map political and administrative jurisdictions onto river basin (districts)— some of which traverse national frontiers and even EU territory—as the natural hydrographical unit. In making the river basin the spatial unit for future water management the WFD, therefore, marked a shift towards an ecosystem-based approach to managing water according to biophysical, rather than political–administrative, boundaries (Moss 2004).

The WFD stipulates that each river basin district should produce an updated 'river basin management plan' (RBMP) every six years. The RBMP should provide an inventory of the current quality of the basin, highlighting the anthropogenic pressures (including causes of water pollution, both diffuse and point-source) on the water body, and a detailed account of how the objectives set for the river basin (ecological status, quantitative status, chemical status and protected area objectives) are to be reached within the timescale required. In this way, the RBMPs represent a key regulatory instrument through which the WFD is implemented in Member States.

As well as rescaling the governance of water at the 'natural' level of the river basin, RBMPs also served as the 'primary locus' (Lee 2008: 45) for the engagement of the public in the management of the water body. A requirement set out by the WFD is that in the production, review and updating of the RBMPs, the full range of stakeholders, including the public, should be consulted. The rationale for this inclusive approach is twofold. Firstly, decisions on the most appropriate measures to achieve the objectives in the RBMP involve making trade-offs (as a wicked problem). It is crucial, therefore, that the process is open to the scrutiny of those who will be affected (CEC 2011). Secondly, it is argued that greater transparency will lead to greater accountability. The inclusion of citizens, interested parties and NGOs in the RBMP facilitate compliance with the objectives of the WFD. Some have taken an expansive interpretation of Article 14 of the WFD to suggest that it mandates the introduction of a participatory model of water governance at the river basin level, drawing on the concept of 'social learning'.

One of the major challenges facing effective water resource management is the extent to which knowledge sharing among the diverse participants, who interact at the interface of technical, scientific, environmental, economic, social and cultural concerns, can be achieved. Weber and Khademian (2008) argue that knowledge sharing and integration are critical to building collaborative problem-solving capacity. They claim that these tasks are particularly acute for networks built around wicked problems, 'where the differences between participants are deep and the barriers to knowledge transfer, receipt, and integration are distinct' (Weber and Khademian 2008: 335). One of the weaknesses of the WFD, and the IWRM paradigm, is that it vastly underestimates the degree of contestation involved in water resource management. For example, the Framework for Action document offers only a depoliticised notion of inte-

grated water management, which it describes as holistic, comprehensive and knowledge-based and thus, by implication, unobjectionable, rather than acknowledging the radically different understandings and views that exist (Conca 2006). The lack of recognition for the role of entrenched ideas in mediating the incorporation of IWRM leads to a focus on the observable and procedural aspects of institutional change and reform and a neglect of the substantive continuity of water pollution control in the UK following the transposition of the EU WFD.

In this congested governance arena, it is unsurprising that a lack of clarity exists on the overarching regulatory approach to water resource management. Interviews with practitioners engaged in the governance of DWP revealed a muddle of competing narratives and traditions. Some interviewees identified a shift towards more participatory, bottom-up approaches to governance as the result of comparative policy learning. For example, one senior EA official observed a definitive:

> a move towards polycentric governance and a citizen science … the great learning from America and Australia is [that] if you enable the ground up participation in policy and governance you get much more buy-in to that policy directive and ownership of that direction … and they are much more inclined to take the rough with the smooth when there are trade-offs. (interview)

Another respondent, however, argued that 'If you want to control something environmental in a top-down fashion, there's huge faith in it in the UK … We are pretty behind the curve in the UK on anything other than command-and-control' (interview). In an interpretive sense, it is possible to consider these as 'overlapping, competing webs of belief that vie with one another' (Rhodes 2011: 104) in the same governance arena. However, both of these narratives rely on the imagery of two constructed ideal types of environmental regulation that bear little relation to how water quality control did and continues to function. While we can observe some gestures towards greater participation and collaboration, these innovations are couched in conventional understandings of the British regulatory tradition. Fundamentally, Britain has remained wedded to a compliance approach in spite of, and not because of the impact of European integration. This is not to deny there are clear differences. The more inclusive approach to participation (although still highly constrained) plus the more diffuse and dispersed nature of pollution, particularly in urban areas, undermine the 'intimacy' of the low relational distance (Black 1976)

relationship between officer and polluter. The momentary, discrete and unpredictable nature of diffuse pollution, similar to more conventional crime, makes the development of consensual relationship between regulator and (potential) polluter much more difficult.

Nevertheless, we can observe how important aspects of the traditional British approach to environmental regulation, such as cooperation, conciliation and informality, began to find theoretical elucidation in the discourses of new environmental governance, such as IMRM and social learning. The work of Ayres and Braithwaite (1992) on 'responsive regulation' and Gunningham et al. (1998) on 'smart regulation' provided further scholarly support to the dominant compliance model in the 'era of governance'. What had conventionally been described by critical scholars, such as Weale (1992), as 'ad-hoc' and 'incremental' as been recast as 'smart'. The impact of the WFD in instigating a shift to more participatory agenda should be understood in the context of these 'new' discourses of 'better regulation'.

After entering government in 1997, Labour began to reformulate the deregulatory rhetoric of the neoliberal tradition into a better regulation agenda. This reconceptualised regulation in more positive terms, with a stress on the *quality* of regulation (in terms of consultation and transparency) as opposed to a narrow view on the *quantity* of regulation (Radaelli 2007, my emphasis). From 1997 onwards it became the responsibility of the newly christened Better Regulation Unit (formerly the Deregulation Unit) to ensure that interconnections between economy and society were ordered more formally, effectively and democratically through state regulation. Ultimately, however, the various reviews of regulation championed under the banner of better regulation have served to reaffirm rather reconstruct the 'regulatory landscape' (Hampton 2005: 76). The discourse of better regulation, which was grounded in the concepts of responsive and risk regulation, reasserted many of the long-established features of the British regulatory tradition. Better regulation, despite its avowed deliberative agenda, was a rhetorical device designed to neutralise pressures for regulation that employed a stronger enforcement model and operated according to more democratic, participatory principles.

In 2004, Labour commissioned two reviews of the British regulatory environment with the intention of exploring different methods of reducing the administrative burden of regulation on business. The first review, conducted by Sir Philip Hampton—a prominent figure in British commerce—recommended that the regulatory state be streamlined through

a narrowing of the criteria used by regulators to conduct inspections of and take enforcement actions against businesses, applying a risk-based approach to regulatory inspection and enforcement, and by simplifying the structure of the regulatory system more generally (Hampton 2005). The Hampon Report was essentially an enunciation of the predominant British regulatory tradition; it called for greater emphasis on advice and education over the 'burden' of inspection. The second review, conducted by the Better Regulation Task Force (BRTF), recommended that regulators employ a more sophisticated system for measuring the cost of regulatory action on business and that regulators adopt a 'one in, one out' policy whereby every new condition is offset with the removal of a pre-existing condition (BRTF 2005). Both sets of recommendations were readily accepted by the government, signalling what Baldwin et al. (1998: 203) have called a 'fundamental shift of the UK Government's rhetoric on regulation'. Armed with these recommendations, the government set about reframing state regulation as a burden on private autonomy and market innovation—a position which, as Weatherill (2007: 2) notes, was reminiscent of the Thatcherite agenda of the 1980s. The umbrella term 'better regulation' was kept, but now 'better' meant 'less'. Turning this rhetoric into practice, the BRTF was reconstituted into the Better Regulation Commission alongside the newly created Better Regulative Executive.

The tone and emphasis of New Labour rhetoric on regulation had decisively shifted; whereas the 1997 manifesto focused on protecting consumer and the environment through 'tough, efficient regulation', by 2005 the emphasis was on supporting enterprise, promising to 'only regulate where necessary … set exacting targets for reaching the costs of administrating regulation … [and] rationalise business inspections' (Labour Party 2005: 21). New Labour engaged in a rhetorical assault on constructed notions of command and control regulation and the nature of risk in contemporary society. While stopping short of fully endorsing it, New Labour often exploited the popular media-driven narrative of the overbearing nanny-state with its politically correct, health and safety regulation. In a 2005 speech to the CBI, Gordon Brown lamented:

> In the old regulatory model – and for more than one hundred years – the implicit principle from health and safety to the administration of tax and financial services has been, irrespective of known risks or past results, 100 per cent inspection whether it be premises, procedures or practices. (Brown 2005)

In exploiting this myth of the overarching panoptic regulatory state, New Labour was able to position its discourse on business-friendly regulation as the central plank of a 'common sense culture, not a compensation culture' (Blair 2005).

The alleged shift from government to governance in the field of water pollution control rests on a similar characterisation of traditional, top-down mode of environmental policy and implementation in the UK. However, this represents a gross oversimplification of the development of water quality control in Britain over time. In reality, for much of its history British environmental policy-making did not conform to a 'decisionist model' (Habermas 1964) of governance, in which the executive dominates the policy process and only uses scientific and technical knowledge and expertise selectively and expediently. Too often in the discussion of new forms of environmental governance, the post-1973 centralising reforms are taken as the point of departure. As a result, a false opposition is created between the 'traditional' command-and-control approach of British environmental regulation and the participatory and collaborative precepts of IWRM and social learning. Such a stark distinction fails to recognise the influence of the British regulatory tradition and its conciliatory instincts, advocating cooperation, rather than command, to control. The debate, therefore, overplays the extent of change and neglects the lines of continuity in the regulation of the environment.

Since the nineteenth century, British environmental policy (and in particular water quality control) has been closer to the administrative–technocratic model, proposed by Sager (2007). In this model, although decision-making is problem driven and may include input from technical experts, the process is as much informed by administrative concerns as scientific evidence. As such, in this administrative–technical model, expertise remains largely state-centred. In a Weberian sense, professional expertise was considered the main preserve of bureaucrats in public institutions, particularly local government. However, this technical expertise was not exclusively reliant on scientific evidence but also on the professional judgement of its field staff in interpreting policy in the context of economic and practical constraints. A consensual approach to policy formulation through the work and deliberations of advisory committees and commissions also tended to produce a broad and imprecise legislative framework, which afforded street-level bureaucrats the high level of administrative discretion they enjoyed. In environmental policy, the British regulatory tradition rested on the assumption that 'professionals with recognized expertise and

competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain' (Haas 1992) were best placed to evaluate the BPM of addressing a problem, even where their final decision deviated from the majority of scientific opinion.

It is important, however, not to overstate the impact of this change. While signalling a change in rhetoric on New Labour behalf, Hampton did not mark, as Tombs (2015: 118) 'the key moment when the practice, and indeed the very idea, of regulation were pushed on the back foot'. Although rates of inspection did fall after 2005, in truth, regulation has never really been on the front foot. Since the nineteenth century it has always been limited and piecemeal. I agree with Tombs that the concepts of responsive and risk regulation have been appropriated by the better regulation agenda to provide intellectual credibility to an essentially neoliberal strategy of regulation. However, I also want argue that this approach to regulation was able to achieve hegemony, not only due to the strategic construction of knowledge, but also because those ideas resonated with the existing ideational terrain of the British regulatory tradition.

By the mid-2000s, Blair and the Labour leadership also began to promote the notion of risk toleration. This concept was premised on the idea that where risks could be objectively quantified it was permissible for regulators to take action, but where risks took on a more subjective quality—which was frequently happening in the more deliberative regulatory forums created in Labour's first term—they would simply have to be tolerated. It was against this backdrop that in a 2005 speech, Tony Blair pledged to 'roll back the tide of regulation' (Blair 2005). State regulation was now being criticised not only on the grounds that regulators curtailed the entrepreneurial ambitions of market actors, but also that a rules-based culture was eroding individual and organisational resilience, ingenuity and agility, turning them into risk-averse dependents of the state.

The EU, and particularly European environmental policy, played an important role in New Labour rhetorical strategy on better regulation. New Labour, particularly during Blair's presidency of the EU in 2004, sought to upload the British model of regulation via the better regulation agenda. While pro-European by instinct, New Labour was strategic in their attempts to nudge the trajectory of EU regulation in the direction of the British 'light-handed' tradition: regulatory creep, Blair (2005) claimed, was 'reinforced by what arises from Europe. About 50 % of regulations with a significant impact on business now emanate from the EU. And it

often seems to want to regulate too heavily without sufficient cause.' New Labour pledged to 'bear down on [EU] regulation … in order to ensure they are proportionate and better designed, in order to avoid any undermining of our own regulatory framework' (Labour Party 2005: 84, 22).

New Labour was hugely successful in this endeavour. The EU Commission Vice-President, Günter Verheugen, stated in a 2005 press release, entitled 'Less red tape = more growth': 'Better regulation at all levels constitutes a central component in the Commission's proposals for revitalising the Lisbon Process.' In true Whiggish fashion, the UK was lauded as a pioneer in the new regulatory philosophy of better regulation. New labour succeeded in transforming the reputation of the UK, derided at the art of the 1990s for its regulatory laxness, by the mid-2000s it was venerated as 'a leader of … regulatory management' (OECD 2010). Even after the financial crisis, the OECD (2010: 38) stated that 'The vigour and breadth of the United Kingdom's Better Regulation policies are impressive.'

Conclusion

The governance of water quality represents an incoherent melange of different drivers and paradigms. The impact of European integration is undoubted; environmental policy and governance, and water resource management in particular, have been increasingly subject to a much more standard-setting, legalistic regime than it was traditionally before membership of the ECC. Together with this process of Europeanisation, the paradigms of sustainable development, IWRM and a rights-based approach to public participation at the international level, through mechanisms such as Brundtland Report and the UN Aarhus Convention, have become increasingly embedded in the discourse and to some extent the practice of the UK government's approach to addressing issues of water quality and pollution.

However, the extent of this shift to a new paradigm of water resource management should not be overstated. Even where there is evidence of decentralisation of decision-making and public engagement, it tends to be framed by a continued attachment to the British regulatory tradition. There is scant evidence to suggest that there has been a shift away from the traditional disavowal of sanctions and penal enforcement of environmental law. Indeed the move towards more negotiated settlements through the catchment approach enables regulators, such as the EA, to avoid such sanctioning strategies. Therefore while the dynamic process of

Europeanisation remains underway in the UK environmental policy sector, the regulation of water quality remains rooted in the broader regulatory and political traditions of the British polity.

Notes

1. Scotland and Northern Ireland have always had distinct regimes of water governance, under their separate legal systems. Devolution of environmental policy since 1997 has seen the regulation of water become increasingly divergent across the four constituent parts of the UK.
2. According to Hassan (1996), this approximate figure comprised 64 local authorities, 101 water boards and joint committees, 33 statutory water companies, 1400 sanitary committees and 29 river authorities.
3. Reports published by the Royal Commission on the Pollution of Rivers (1865) included: First Report (River Thames), No.3634, 1866; Second Report (River Lea), No.3835, 1867; Third Report (Rivers Aire and Calder), No.3850, 1967. Royal Commission on the Rivers Pollution of (1868): First Report (Rivers Mersey and Ribble), C.37, 1870; Second Report (The 'ABC' sewage Process), C.181, 1870; Third Report (Woollen Manufacturers Rivers), C.347, 1871; Fourth Report (Scottish Rivers), C.603, 1872; Fifth Report (Mining and Metal Manufacturers Rivers) C.951, 1874; Sixth Report (Water Supply), C.1112, 1874.
4. The theme of integration at the regional level was not replicated in Whitehall; despite the acknowledgment that water is a dynamic natural resource involving complex interdependencies, its governance at the national policy-level has tended to be discretely organised along hierarchical lines. Initially, the Ministry for Agriculture, Fisheries and Food (MAFF) was the key sponsoring department as central government began to take a coordinating role in 1920s over water resource management issues, such as flood protection and land drainage. However, other related issues, such as water supply and sewage disposal, were the responsibility of the Ministry of Health as local authority functions. After 1970, the newly created Department of Environment (DoE) took a lead role in environmental protection, including water pollution control. Despite this change in the machinery of government, water policy remained fragmented across a number of Whitehall departments leading to recurring tensions and turf battles over competence and jurisdiction, especially between MAFF and the DoE (Kinnersely 1988). Further reorganisations in Whitehall, including the merger of agriculture and environmental concerns through the creation of Defra (Department for Environment, Food and Rural Affairs) in 2001, have improved but not resolved these pathologies of departmentalism. Environmental protection, in terms of legislation, management structures and associated budgets,

remains 'siloed' and largely absent from policy formulation and implementation in other key areas such as trade, industry, transport and planning (Everard 2012).

5. The 1989 Water Act, which privatised the ten RWAs as vertically integrated monopolies, led to the separation of the responsibility for the supply of clean water and sewage treatment from the regulation of water resources. The former was hived off into the privately owned water companies and the latter was operationalised through the establishment of a complex regulatory regime: efficiency was to be monitored and promoted via the control of price and yardstick competition, by a new economic regulator Ofwat (the Water Services Regulation Authority); the regulation of water quality, river management and conservation was assigned to a separate independent body, the National Rivers Authority (NRA), with further environmental protection duties delegated to Her Majesty's Inspectorate of Pollution (HMIP) and the DWI. The NRA and its duties were superseded by the EA from April 1996, under the Environment Act 1995, along with the roles and responsibilities of HMIP and the waste regulation authorities in England and Wales.

Bibliography

Aberbach, J. D., & Christensen, T. (2001). Radical reform in New Zealand: crisis, windows of opportunity, and rational actors. *Public Administration, 79*(2), 403–422.

Allen G. M. and Gould, E. M. (1986). Complexity, wickedness, and public forests. Journal of Forestry *84,* 20–23.

Ashby, E. and Andersen, M. (1981). The Politics of Clean Air. Oxford: Oxford University Press.

Ayres, I., & Braithwaite, J. (1992). *Responsive regulation: Transcending the deregulation debate*. Oxford University Press.

Bache, I., & Jordan, A. (2006). *The Europeanization of British politics*. Palgrave Macmillan.

Baldwin, R., Scott, C., & Hood, C. (1998). *A reader on regulation*. Oxford University Press.

Bardach, E., & Kagan, R. A. (1982). *Going by the book: The problem of regulatory unreasonableness*. Transaction Publishers.

Bernstein, M. H. (1955). *Regulating business by independent commission*. Princeton, NJ: Princeton University Press.

Better Regulation Task Force (BRTF) (2005). Less is More: Reducing Burdens, Improving Outcomes. London: Cabinet Office.

Black, D. (1976). *The behavior of law*. Bingley: Emerald Group Publishing.

Black, J. (2001). Managing discretion. *Unpublished manuscript, London School of Economics,* UK.

Blair, T. (2005). Speech to the Institute for Public Policy Research. May 26 2005. London: IPPR.

Box, S. (2002). *Power, crime and mystification*. Routledge.

Breeze, L. E. (1993). *The British experience with river pollution, 1865–1876*. P. Lang.

Brown, G. (2005). *Gordon Brown's speech to the annual conference of the Confederation of British Industry*. Retrieved July 19, 2015, from http://www.ft.com/cms/s/2/9073a120-600d-11da-a3a6-0000779e2340.html#axzz41bH2L4bU

Bulmer, S., & Jeffery, C. (2010). Does Congruence Matter? Germany and Britain in the European Union. In Bulmer, S. and Jeffrey, C. (Eds.) *Rethinking Germany and Europe* (pp. 113–138). Basingstoke: Palgrave Macmillan.

Bulpitt, J. (1986). The discipline of the new democracy: Mrs Thatcher's domestic statecraft. *Political Studies, 34*(1), 19–39.

Caulfield, C. (1981). Environment: Britain lags, Europe leads. *New Scientist*, *91*, 1266.

CEC (1993). Green Paper on Remedying Damage to the Environment, COM(93) 47, Brussels, CEC.

Churchill, W. (1946). Speech to the academic youth, the University of Zurich in 1946. Available at: http://europa.eu/about-eu/eu-history/founding-fathers/pdf/winston_churchill_en.pdf

Cohen, M. D., March, J. G., & Olsen, J. P. (1972). A garbage can model of organizational choice. *Administrative science quarterly, 17*(1), 1–25.

Conca, K. (2006). Governing water. In *Contentious transnational politics and global institution building*. Cambridge and London: Massachusetts Institute of Technology.

Conklin, J. (2006). Wicked problems and social complexity. Technical Report, CogNexus Institute. Edgewater, Maryland: USA.

Conway, G. R., & Pretty, J. N. (2013). *Unwelcome harvest: Agriculture and pollution*. Routledge.

Council Directive (EC) 75/440/EEC of 18/06/1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States – Repealed by Directive 2000/60/EC establishing a framework for Community action in the field of water policy (1975) 31975L0440

Croall, H. (1992). White collar crime. *Criminal Justice and Criminology*. Buckingham: Open University Press.

Day, P., & Klein, R. (1987). *Accountabilities: Five public services*. Taylor & Francis.

Demmke, C. (1997). *Managing European environmental policy: The role of the member states in the policy process*. European Institute of Public Administration.

Elworthy, S., & Holder, J. (1997). *Environmental Protection: Text and Materials*. Cambridge University Press.

EU. (2000). *Water Framework Directive*.

European Communities Committee, 257, H. (1981). *Report of the European Communities Committee on water pollution by cadmium discharges*. London: HMSO.

European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.
Fairman, R., & Yapp, C. (2005). Enforced self-regulation, prescription, and conceptions of compliance within small businesses: The impact of enforcement. *Law & Policy, 27*(4), 491–519.
Fisher, E., Fisher, E. C., Lange, B., & Scotford, E. (2013). *Environmental law: Text, Cases & Materials*. Oxford : Oxford University Press.
Flynn, A., & Baylis, R. (1996). Pollution regulation and ecological modernization: The formulation and implementation of best available techniques not entailing excessive costs. *International Planning Studies, 1*(3), 311–329.
Geertz, C. (1994). Thick description: Toward an interpretive theory of culture. In Martin, M. and McINtyre, L.C. (Eds.) *Readings in the philosophy of social science*, London: MIT Press, 213–231.
George, S. (1998). *An awkward partner: Britain in the European Community*. New Yotk: Oxford University Press.
Gleick, P. H. (2003). Global freshwater resources: Soft-path solutions for the 21st century. *Science, 302*(5650), 1524–1528.
Global Water Partnership (GWP) (2000). Towards Water Security: A Framework for Action. Stockholm: GWP.
Greenaway, J. R., Smith, S., & Street, J. (1992). *Deciding factors in British politics: A case-study approach*. Taylor & Francis.
Gunningham, N., Grabosky, P. N., & Sinclair, D. (1998). *Smart regulation: Designing environmental policy*. Oxford: Clarendon Press.
Haas, P. M. (1992). Epistemic communities and international policy coordination: Introduction. *International Organization, 46*(1), 1–35.
Habermas, J. (1964). *Verwissenschaftlichte Politik und öffentliche Meinung*. Rentsch.
Hampton, P. (2005). *Reducing administrative burdens: Effective inspection and enforcement*. London: HMSO.
Harrison, R. M. (2001). *Pollution: Causes, effects and control*. Royal Society of Chemistry.
Hassan, J. (1996). *The European water environment in a period of transformation*. Manchester University Press.
Hassan, J. (1998). *A history of water in modern England and Wales*. Manchester University Press.
Hawkins, K. (1984). *Environment and enforcement: Regulation and the social definition of pollution*. Oxford: Clarendon Press.
HC Deb 19 May 1958 vol. 588, c. *Rivers (Prevention of Pollution)*.
Head, B., & Alford, J. (2008, July). Wicked problems: Implications for policy and management. Presentation delivered to the Australasian Political Studies Association Conference (pp. 6–9).
Head, B. W. (2010). Water policy—Evidence, learning and the governance of uncertainty. *Policy and Society, 29*(2), 171–180.

Hearnshaw, E. J., Tompkins, J.-M., & Cullen, R. (2011). Addressing the wicked problem of water resource management: An ecosystem services approach. Paper presented at the 55th Annual AARES National Conference Melbourne, Victoria.

Hill, M. (1983). The role of the British Alkali and Clean Air Inspectorate in air pollution control. In Downing, P.B. and Hanf, K. (Eds.) *International comparisons in implementing pollution laws Boston: Kluwer-Nijhoff Publ*, 87–106.

HM Chief Alkali Inspector. (1974). Annual Report on Alkali etc. Works Regulations. HMSO: London.

Hüesker, F., & Moss, T. (2015). The politics of multi-scalar action in river basin management: Implementing the EU Water Framework Directive (WFD). *Land Use Policy, 42*, 38–47.

Hutter, B. (1997). *Compliance: Regulation and enforcement*. Oxford: Clarendon Press.

Jordan, A. J., & Liefferink, D. (2004). *Environmental policy in Europe: The Europeanization of national environmental policy*. Routledge.

Jordan, G., & Richardson, J. (1982). The British policy style or the logic of negotiation?. In Richardson, J. (Ed.) *Policy Styles in Western Europe*, 80–110.

Kallis, G., & Butler, D. (2001). The EU Water Framework Directive: Measures and implications. *Water Policy, 3*(2), 125–142.

Kinnersley, D. (1988). Troubled Water: Rivers, Politics and Pollution. London: Shipman.

Knill, C. (1998). European policies: The impact of national administrative traditions. *Journal of Public Policy, 18*(01), 1–28.

Kramer, L. (2002). Thirty years of EC environmental law: Perspectives and prospectives. *The Yearbook of European Environmental Law, 2*, 155–182.

Labour Party (2005). Labour Party Manifesto: Britain forward not back. Available at: http://ucrel.lancs.ac.uk/wmatrix/tutorial/labour%20manifesto%202005.pdf

Lange, B. (1998). Understanding regulatory law: Empirical versus systems-theoretical approaches? *Oxford Journal of Legal Studies, 18*(3), 449–471.

Lange, B. (2008). *Implementing EU pollution control: Law and integration*. Cambridge University Press.

Lee, M. (2008). Law and governance of water protection policy. In Scott, J. (Ed.) *EU Environmental Governance*. Oxford University Press (2009).

Lindblom, C. E. (1959). The science of "muddling through". *Public Administration Review, 19*(2), 79–88.

Lipsky, M. (1980). *Street-level bureaucracy: Dilemmas of the individual in public services*. New York: Russell Sage.

Loew, P. and Goyder, J. (1983) Environment Groups in Politics. Lodnon: Allen and Unwin.

Lowe, P., & Ward, S. (1998). *British environmental policy and Europe: Politics and policy in transition*. Psychology Press.
Lynk, E. L. (1993). Privatisation, joint production and the comparative efficiencies of private and public ownership: The UK water industry case. *Fiscal Studies, 14*(2), 98–116.
Macnaghten, P., & Urry, J. (1998). *Contested natures*. Sage.
Majone, G. (1994). The rise of the regulatory state in Europe. *West European Politics, 17*(3), 77–101.
Malcolm, R. (1994). *A guidebook to environmental law*. Sweet & Maxwell.
Maloney, W. A., & Richardson, J. (1994). Water policy-making in England and Wales: Policy communities under pressure?. *Environmental Politics, 3*(4), 110–138.
Mazey, S., & Richardson, J. (1992). Environmental groups and the EC: challenges and opportunities. *Environmental Politics, 1*(4), 109–128.
McCormick, J. (2013). *British politics and the environment*. Routledge.
McCulloch, C. S. (2009). The Water Resources Board: England and Wales' venture into National Water Resources Planning, 1964–1973. *Water Alternatives, 2*(3), 461–475.
McLoughlin, J., & Forster, M. (1976). *The law and practice relating to pollution control in the United Kingdom*. Graham & Trotman for the Commission of the European Communities.
Moran, M. (2003). *The British Regulatory State: High modernism and hyper-innovation: High modernism and hyper-innovation*. Oxford University Press.
Moss, T. (2004). The governance of land use in river basins: Prospects for overcoming problems of institutional interplay with the EU Water Framework Directive. *Land Use Policy, 21*(1), 85–94.
Moss, T., Medd, W., Guy, S., & Marvin, S. (2009). Organising water: The hidden role of intermediary work. *Water Alternatives, 2*(1), 16–33.
Mulholland, K. (2002). 'Throwing the baby out with the bath-water': Managers and managerialism in the post-privatised utilities. *Capital & Class, 26*(2), 53–87.
National Audit Office (NAO) (2010). Tackling diffuse water pollution in England. HC: 188 (2010–2011). London: HMSO.
Niskanen, W. A. (1974). *Bureaucracy and representative government*. Transaction Publishers.
Novotny, V., & Olem, H. (1994). *Water quality: Diffuse pollution and watershed management*. New York: Von Nostrand Reinhold.
OECD. (2010). *Regulatory Management Systems*. Paris: OECD.
Olsen, J. (2003). Towards a European administrative space? *Journal of European Public Policy, 10*(4), 506–531.
Ostrom, E. (2001). Vulnerability and polycentric governance systems. *IHDP Update, 3*(01), 1–4.

Pahl-Wostl, C. (2007). Transitions towards adaptive management of water facing climate and global change. *Water Resources Management, 21*(1), 49–62.

Pahl-Wostl, C., Craps, M., Dewulf, A., Mostert, E., Tabara, D., & Taillieu, T. (2007). Social learning and water resources management. *Ecology and Society, 12*(2), 2007.

Parker, D. J., & Sewell, W. (1988). Evolving water institutions in England and Wales: An assessment of two decades of experience. *Natural Resources Journal, 28*, 751.

Pearce, F., & Tombs, S. (1990). Ideology, hegemony, and empiricism compliance theories of regulation. *British Journal of Criminology, 30*(4), 423–443.

Pierre, J., & Peters, G. B. (2000). Governance, politics and the state. Basingstoke: Macmillan.

Pierre, J., & Peters, B. (2003). Handbook of Public Administration. London: Sage.

Porritt, J. (1989). The United Kingdom: The dirty man of Europe? *RSA Journal, 137*(5396), 488–500.

Powell, W. W. (1998). Learning from collaboration: Knowledge and networks in the biotechnology and pharmaceutical industries. *California Management Review, 40*(3), 228–240.

Radaelli, C. M. (2003). The Europeanization of public policy. In Featherstone, K. and Radaelli, C. (Eds.) *The politics of Europeanization*, Oxford: Oxford University Press (27–56).

Radaelli, C. M. (2007). Whither better regulation for the Lisbon agenda? *Journal of European public policy, 14*(2), 190–207.

Rhodes, R. A. W. (1997) Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability. Buckingham: Open University Press.

Rhodes, R. A. W. (2011). *Everyday life in British government*. Oxford University Press.

Richardson, G. (1982). Policing pollution: The enforcement process. *Policy Studies Journal, 11*(1), 153–164.

Richardson, J. (2013). *Policy styles in Western Europe (Routledge Revivals)*. Routledge.

Richardson, J. J., & Watts, N. S. (1985). *National policy styles and the environment: Britain and West Germany compared*. Internationales Institut für Umwelt und Gesellschaft des Wissentschaftszentrums.

Rittel, H. W., & Webber, M. M. (1973). Dilemmas in a general theory of planning. *Policy Sciences, 4*(2), 155–169.

Rose, C. (1990). *The dirty man of Europe: The Great British pollution scandal*. Simon & Schuster.

Rosenthal, L. (2014). *The river pollution dilemma in Victorian England: Nuisance law versus economic efficiency*. Ashgate Publishing.

Royal Commission on Environmental Pollution. (1984). *Tackling pollution—Experience and prospects*. London: Royal Commission on Environmental Pollution.

Royal Commission on Environmental Pollution. (1992). *Freshwater quality*. London: HMSO.

Sager, F. (2007). Habermas' models of decisionism, technocracy and pragmatism in times of governance: The relationship of public administration, politics and science in the alcohol prevention policies of the Swiss Member States. *Public Administration, 85*(2), 429–447.

Sheail, J. (1993). Sewering the English suburbs: An inter-war perspective. *Journal of Historical Geography, 19*(4), 433–447.

Taylor, E. W. (1949). *Thresh, Beale and Suckling's: The examination of waters and water supplies*. London: J. and A. Churchill Ltd.

Tombs, S. (2015). *Social protection after the crisis: Regulation without enforcement*. Policy Press.

Vogel, D. (1983). Cooperative regulation-environmental-protection in Great-Britain. *Public Interest, 72*, 88–106.

Vogel, D. (1986). National styles of regulation: Environmental policy in Great Britain and the United States. Ithaca, NY: Cornell University Press

Vogel, D. (2003a). The hare and the tortoise revisited: The new politics of consumer and environmental regulation in Europe. *British Journal of Political Science, 33*(4), 557–580.

Vogel, D. (2003b). *National styles of business regulation: A case study of environmental protection*. Beard Books.

Ward, N., Buller, H., & Lowe, P. (1995). *Implementing European environmental policy at the local level: The British experience with water quality directives*. Newcastle upon Tyne: Centre for Rural Economy, University of Newcastle upon Tyne. *Notes,* 1, 330–343.

Weale, A. (1992). *The new politics of pollution*. Manchester University Press.

Weatherill, S. (2007). 'The challenge of better regulation'. In Weatherill, S. (Ed.), Better Regulation. Oxford/Portland: Hart Publishing (1–17).

Weber, E. P., & Khademian, A. M. (2008). Wicked problems, knowledge challenges, and collaborative capacity builders in network settings. *Public Administration Review, 68*(2), 334–349.

Windhoff-Héritier, A. (2001). *Differential Europe: The European Union impact on national policymaking*. Rowman & Littlefield.

World Commission on Water for the 21st Century (WCW). (2000). The Africa Water Vision for 2025: equitable and sustainable use of water for socioeconomic development. http://www.worldwatercouncil.org/.

CHAPTER 6

The Participatory Tradition: Football and the Crisis of Self-Regulation

Introduction

Crisis is an overused word in English football. In the fickle soap opera of the modern game, which operates in the glare of intense scrutiny from both traditional and new social media, the language of crisis is a staple of the sport's everyday vernacular. Less parochially, a range of different narratives of crisis have been applied to off-field matters—invoking the discourses of hooliganism, supporter safety, racism, social exclusion and financial impropriety—in the last 50 years by various stakeholders and observers of the game (Garland et al. 2000; Wagg 2004; Brown 1998). The so-called dark days of football in the 1970s and 1980s, when the game became mired in violence, racism and disorder, were frequently presented as symptomatic of Britain's post-war decline and the pathologies of an ill-disciplined and permissive society under the Keynesian welfare state (Morgan 1990). These were seen to be crises *in* football; in other words, they were characterised as problems for the sport's governing bodies to address with little external interference or change to the basic parameters of its governance.

In the last two decades, there has been a growing sense that many of the problems in football can be attributed to the governance failures of the football authorities in England: the Football Association (FA), the Football League and the Premier League. In other words, there was recognition that there is a crisis *of* football. In September 2010, Sports

D. Fitzpatrick, *The Politics of Regulation in the UK*,
DOI 10.1057/978-1-137-46199-5_6

Minister, Hugh Roberston, observed: ' if you look across sport, it is very clear to me that football is the worst governed sport in this country, without a shadow of a doubt' (HC Deb, vol 8, c73WH). A growing consensus has emerged that the governance regime of English football is beset by pathologies of overlapping vested interests and a lack of independence, accountability and transparency (CMS Select Committee 2013). Since the breakaway of the Premiership in 1992, the untrammelled commercialisation and globalisation of football has given rise to the perception that the game has drifted away from its roots and 'lost its soul', leading to a more existential crisis for 'traditional' supporters (Conn 2010).

The nature of this crisis in football governance has often been assumed within the academic literature and journalistic commentary and is therefore underexplored and undertheorised. Taking a wider and more theoretical perspective, this chapter seeks to move beyond these narratives to argue that the contemporary problems in English football represent a deeper crisis of legitimacy for football's governing bodies, which in turn reflects a broader decline of public confidence in the self-governing codes of the British regulatory tradition. As previous chapters have shown, the British polity is characterised by a top-down approach to governance; this elitist conception of democracy, which is encapsulated by literature on the BPT, has also decisively shaped the wider patterns of governance and regulation in society. The closed, elitist 'club world' of regulation that emerged in the nineteenth century and was consolidated in the twentieth century was based on a normative ideal of self-regulation. In a contemporary political climate where trust, deference and confidence in major public and private institutions are at a premium, this mode of self-regulatory governance is increasingly subject to challenge and criticism. Many of the traditional self-regulatory domains, which are premised on a nineteenth-century model of democracy and participation, have become unsustainable in the context of twenty-first-century expectations, technologies and demands of transparency (Richards et al. 2014).

Football offers a useful case study for understanding the changing dynamics of self-regulation in the UK. There is a tendency to view football and its governance as distinct from the wider polity; reflecting what Allison (1986) calls sport's 'myth of autonomy'. Some academic studies of the regulation of football have reinforced this false delineation, emphasising the 'particular and peculiar nature of the footballing industry' (Michie and Oughton 2002) while neglecting its commonalities with the governance of other economic domains. The importance of sport, and particularly

football as the national game, for understanding wider patterns of politics and power in British society is largely ignored in the political science and public policy literature (Houlihan et al. 2009). Football is not an isolated sphere of activity, but as King (2010: 890) observes, 'a public ritual [that] is deeply embedded into the wider institutional and political realities of which it is a conscious reflection and manifestation'. The conventional apolitical approach to the governance of football, however, exemplifies the moral and political ambivalence of the British regulatory tradition. Paradoxically, therefore, it is the acute sense of detachment from other social and economic domains of the state that makes the governance of football a particularly instructive case study of the wider institutional and regulatory trajectory of British politics over time.

The *otherness* of sport in the wider context of British politics is derived from its inception in a pre-democratic context, in which the ideal of the 'gentleman amateur' was privileged. This 'amateur ideal' was embedded in the corridors of Whitehall, where the imagery of the 'non-specialist' or 'all-rounder' resonated as much as in the clubhouses and boardrooms of British sport. Historically, the administrative elite in Britain has been disproportionately represented by men from a narrow social and educational background, particularly Oxbridge and the major public schools, which was steeped in the late Victorian belief in amateurism, in government as well as sport (Polley 2006). What Allison (1986) refers to the as the 'amateur hegemony' was manifested in the relations between the state and sport in three ways: an instinctive aversion on behalf of politicians and officials to intervene in 'voluntarisitic fabric of British sport'; preferential treatment for the 'gentlemen amateur' (athlete, cricketer, rugby union player) over the 'unsportsmanlike behaviour' of professionals (particularly footballers); and the informal and private nature of 'official' involvement of the state in sport (Polley 2006: 457, 461).

The underlining political and institutional origins of football remain apparent today. Despite the changes associated with greater commercialisation and globalisation, the governance of professional football has altered little since its establishment in the mid-nineteenth century. Indeed the evolution of English football is characterised by a remarkable continuity, punctuated by two critical junctures: the legalisation of professionalism in 1885 and the creation of the Premiership in 1992. The first represents a strategic adaption on behalf of the FA, as the incumbent governing body, which typifies the flexible and conciliatory features of the British regulatory tradition. The colonisation of football's terrace culture, if not

leadership, by the working class from the 1880s was deemed a threat to the predominance of the public schools. The attempt to impose a system of managed professionalism was designed to conciliate the increasing number of working-class players and the northern clubs they played for in order to preserve the unity of the game and the underlying bourgeois control of it. Hence since the late nineteenth-century English football was characterised by a prototypical form of British civic capitalism: companies owned and managed by individual or small groups of businessmen run according to the amateur values of upper-class gentlemanly culture, ostensibly in the wider interests of the 'people's game'.

The stasis of football governance over the next century is in part linked to the resilience of the wider dominant regulatory and political traditions. As Baker observes:

> Sport, being to a degree tradition bound, lent itself to control based on a set of principles which sought to moderate change and thus enhance stability. Such principles represented accommodation between a besieged but resilient aristocracy and an increasingly secure and thus conservative professional middle class.

Despite the strong normative character of football's self-regulation, bolstered by the absence of any tradition of public law in the realm of sport, the governance and political economy of the game has become increasingly politicised in the last two decades. While it is misleading to suggest that football has ever been a hermetically sealed domain, impervious to wider social and cultural patterns in the British polity, there is no doubt that the governing bodies English football have been subject to increasing challenge, from both above and below.

The politicisation of English football has centred on the enhanced scrutiny and criticism of central government and the increasing activism of supporters. The crisis of English football, according to Boin and t'Hart's (2000: 10) definition, is thus characterised by: 'intense media scrutiny, public criticism, political controversy, and calls for reform'. While useful, this definition underplays the structural and institutional underpinnings of crisis, alongside the process of crisis narration (Diamond 2014). Both members of the political class and supporters groups have drawn on an alternative, more participatory, conception of democracy in their campaigns to reform the governance of English football. As such, the 'crisis' of football represents a challenge not just for the game's governing bodies, but also strikes at the heart of the British regulatory tradition.

This chapter examines the dynamics of this governance crisis in English football and consider the implications for the broader discussion on the traditions of UK regulation. The chapter is organised into four sections. The first two sections explore how the evolution of professional association football has been shaped by the dominant political and regulatory traditions since its establishment in the pre-democratic mid-nineteenth century. This relative equilibrium of these underlying political and regulatory traditions was interrupted by the trauma of the Hillsborough disaster in 1989. The third section explores how Hillsborough precipitated wide-escale change in the political economy of football, while also entrenching the elitist governing code of the English game. It argues that measures to enhance the regulation of crowd safety in football stadia were accompanied by a deregulation of football finance that has facilitated a rapid commercialisation of the game. This commercialisation and commodification, allied to a more general decline in deference, have made it harder for club hierarchies and football's governing authorities to maintain their image as moral guardians of the game. The fourth section considers the possible consequences of this crisis of legitimacy for the self-regulatory character of football and the prospect of more formalised, direct state oversight. This final section also examines the growth of fan democracy, the collective term for various supporters' movements, and their attempts to achieve greater influence over and access to the decision-making processes based on an alternative participatory tradition of democracy and regulation.

Football in the British Political Tradition

Football is popularly referred to as 'the people's game' (Walvin 1975). While the personal, emotional and cultural 'stake' supporters have in their football clubs may lend some credence to the use of this time-worn sobriquet, in reality football, in terms of the representativeness of the national ruling bodies and the corporate governance of individual clubs, has never been democratic. In this respect, the notion of the 'people's game' is an invented tradition (Hobsbawm and Ranger 2012), propagated by the patrician elite who have controlled the game. The governance of football has developed according to a process of elite renewal, in which different sets of powerful actors within football have been able to utilise 'windows of opportunity' (Kingdon 2003) created by periodic crises to shape the evolution of football and retain a tight grip on the levers of power. The public schools, as the traditional authority in English football during

the mid-nineteenth century, were usurped by bourgeois professional and industrial interests in the creation of the FA and the codification of the game; since the creation of the Premiership 1992, the FA has relinquished its regulatory role and increasingly ceded power to the major top-flight clubs, represented by the Premier League, many of which are now foreign-owned and controlled by members of a global economic elite traversing the USA, Russia and the United Arab Emirates.

The governance of English football, therefore, has invariably excluded the game's various stakeholders and has been seen to increasingly favour the commercial interests of the big clubs in the English top-flight to the detriment of other sporting, cultural and social concerns. In affording little representation beyond a limited group of core and established interests, the governance of football displays many of the hallmark features of the elitist conception of democracy characterised by the BPT. This should not be surprising given Beer's conception of the BPT as 'a body of beliefs widely shared in society' (Beer 1965: x–xi). For Beer, the BPT pervades the British polity; for although the apogee of 'club rule' is Westminster and Whitehall, the BPT also inculcated wider political culture and is reflected in the institutions and systems of governance in society and the attitudes of the general populace.

In an analogous way to politics, representation and participation in the governance of football has, and continues to be, significantly limited: in an FA Council—the so-called parliament of English football—of 121 members, the Army, the Royal Navy and the Royal Air Force, the Independent Schools, Oxford and Cambridge, all enjoy the same level of representation as the 13.6 million match-attending supporters in England (HC 792-I, Ev w71). As such, football's biggest constituency—'the people who should have the most say: the fans' (APPG on Football 2009: 14)—is afforded little voice amongst a chorus of established interests, the majority of which have been in situ since the establishment of the FA in 1863. With only 6 women (and a solitary female on the 12-person FA Board) and 2 non-white members in the Council, two-thirds of which are over 64, and a contemptible disregard for people from the LGBT (lesbian, gay, bisexual or transgender) community, the governance of English football is also distinctly 'male, pale and stale'. FA Chairman Greg Dyke conceded that the 'an overwhelmingly male and white' FA Council risks becoming irrelevant in the context of an increasingly diverse football public (Conway 2014). Moreover, the League Managers Association, the Players Association and the Football Supporters Federation are excluded from the key decision-making processes of the FA,

having no representatives between them on either the FA's Main Board or the Professional Game Board, who hold the executive power to set the agenda. Power, therefore, is concentrated in the hands of the chairman and directors of the Premier League clubs, with the (amateur) 'blazers brigade' holding some nominal influence by virtue of their incumbency in the pre-existing governance structures.

Historically, the restriction on representation to the 'key elements in the game' has been legitimised, at least implicitly, on the basis that those in positions of power are custodians of the national game who act in the best interests of football as a whole. The vast majority of the FA's representatives are drawn from its own county and divisional structure, which is itself dominated by a white, male, middle-class demographic and thus 'rooted in masculine values and patriarchal exclusiveness' (Whannel 1992: 31).

In this patriarchal structure, football has been suffused in a paternalistic culture and outlook. Football historians have shown that although there were always notable exceptions, both the FA and the club owners and directors were generally benign in their attitude, seeing themselves or at least maintaining the perception that they were custodians or moral guardians of game (Mason 1981; Walvin 1975; Russell 1997). This view is epitomised by Lord Burlison, a former professional footballer (for Lincoln City, Hartlepool United and Darlington) and trade unionist, in a nostalgic appeal to a 'golden-age' of football: 'the 1950s—I know that all the chairmen have been reputable, caring people who have wanted to do a job not only for the club [Hartlepool] but also for the town' (HL Deb, 3 July 2002, c327). Undoubtedly, many football club chairmen and directors were also motivated by the social cachet and commercial advantages (particularly for those in the brewing and gambling industry) that could be derived from being involved in the professional game (Millward 2011). Moreover, the economic imperatives of running a football club were apparent very early on in the birth of football in England: Woolwich Arsenal's decision to move from Plumstead to the more densely populated Highbury being a case in point (Conn 2010). However, despite their frequent 'selfishness and shallow thinking' (Hardaker and Butler 1977: 97), the inhabitants of most football club boardrooms seem to have at least viewed themselves as guardians of the 'gentlemen's game' and the Corinthian values first developed in the public schools. As such, the conservative notion of responsibility resonates strongly with the origins of football and its governance. Consequently, the need for wider representation was deemed unnecessary; if indeed it was ever seriously considered. Although there are a number of

qualifications to the empirical reality of the dominant 'benefactor model', what was important, as Matthew Taylor (2007: 6) writes, 'was that the illusion of responsibility towards the supporters was maintained'.

The governance of English football is thus underpinned by a limited conception of representation and a (rhetorical) conservative notion of responsibility. Its evolution cannot be understood without reference to the historical context of its origins in the mid-nineteenth century. A period of social and political unrest, as radicalised members of the middle class and working class sought political and social rights, created a charged climate in which the ruling aristocracy was concerned about the need to quell such elements within society. In this context the establishment of association football and its governing authorities (in the shape of the Football Association and the Football League) in the late nineteenth century, before the arrival of full democracy, has been critical to the way in which football has developed and evolved thereafter. Its formative development in this period saw it inscribed not only with an inherently elitist and patrician perspective but also an organisational culture based on a strong protection of its self-regulatory character.

The 'Club Regulation' of the FA

The establishment of the FA in 1863 as the game's governing body was part of a wider period of institutional innovation in the mid-nineteenth century, which also saw the formation of other self-regulatory authorities in sport such as Amateur Athletic Association (AAA) in 1880, as well other domains of social and economic life: the creation of the British Medical Council (1856) and the Royal Institute of Chartered Surveyors (1868) being two notable examples. Archival analysis of professional football's nineteenth-century origins has shown that most of the 'Founding Fathers' of the FA were employed in the emerging self-regulatory professions of journalism, law and architecture (FA 2013). In seeking to organise the 'modern' sports of football and rugby, the rising metropolitan professional class adopted the model offered by the Marylebone Cricket Club (MCC), the Jockey Club and the Royal and Ancient Golf Club (R&A) in the aristocratic sports of cricket, horse racing and golf that had been established in the eighteenth century.

Consequently, the FA was a quintessentially 'clubby' organisation, reflecting its informal assimilation into 'upper-class gentlemanly cultures' (Moran 2003: 87). Although the Founding Fathers sought to emulate the

aristocratic amateur ethos, the establishment of the FA, akin to the emergence of other self-regulatory domains of the period, reflected the growing confidence of the middle class who—emboldened by the 1832 Reform Act—were attempting to carve out distinct social, political and economic spaces for their interests in a way that distinguished them from both 'a dissolute aristocracy and an uncivilised working class' (Collins 2013: 29). Whereas the MCC and the R&A were associations of individuals within one single rule-making body, the FA was a large federation of clubs determining and enforcing rules: 'a kind of club of clubs' (Szymanski 2006: 24). The regulatory function of the FA sat uncomfortably with the associational model on which it was based and would ultimately lead to tension between the different bourgeois factions of which it incorporated. Lacking the exclusive class formation of bodies, such as the AAA, the FA included members of both the entrepreneurial and professional middle class, which were mainly (though not uniformly) concentrated in the industrial north and salaried service and managerial south, respectively (MacLean 2008; Baker 2004; Perkin 1990).

Given the timing of its inception and the British common law tradition, it was axiomatic that such a self-regulatory approach would also apply to the Victorian 'gentlemen' at 28 Paternoster Row—the FA's first headquarters—who were free to govern the fledgling game of association football as they saw fit. Football's, and indeed modern sport's, emergence in this pre-democratic context meant it came to share many of the values and ideas that permeated many other traditional British institutions of the period. The values of amateurism and the principles of voluntarism inscribed into the institutions and governing practices of football were directly related to the elitist ideals of the mid-nineteenth century. As Russell (1997: 14) observes:

> Bold defence of amateurism was, arguably, rooted in something far deeper than just the narrow 'sporting' arena, much of its potency arising from its political value as a symbolic rejection of unattractive elements of mass culture and, thereby, mass democracy.

The governance of sport, and the discourses used to legitimise it, had become a form of 'deep-politics'; the political ideas and values of self-regulation were expressed in a seemingly non-political way, which resonated with the dominant political and regulatory traditions of the era. As Collins (2013: 26) asserts: 'Far from being outside of the concerns of

political life, sport was so tightly woven into the political culture of the commonplace that its politics appeared to be invisible.'

The nature of self-regulation, in football and the British polity more generally, has not remained constant, however. In the post-war era, the traditional indifference of government to football began to change. This introspection was motivated by two key factors: the poor performance of the national team in the 1950s (following humiliating defeats to Ireland and Hungary on home soil) that chimed with the concerns about Britain's relative economic decline and a loss of confidence in Britain's ability to compete with other nations on the world stage (Glanville 1955; Porter 2004); and the growing problem of football violence from the 1960s.

The first substantive incursion of the state into football governance was initiated by the Labour government in 1966. In the afterglow of England's World Cup victory, Anthony Crosland, the then Secretary of State for Education and Science, commissioned Sir Norman Chester to report on 'The State of Association Football' and inquire into means by which the game could be developed for 'the public good'. One of the key areas of particular concern for Chester was the strategic and financial planning capacity of the FA and club boards in the midst of declining post-war attendances. Despite political pressure on the government to act upon the Chester report's recommendations to professionalise the governance of football the report failed to overcome the 'resistance from some of the all-too-amateur worthies in positions of power within the game' (HC Deb, 15 October 1969 788 c563) and did little more than gather dust in the House of Commons library. In more recent decades, the increasing significance of football to the wider economy (Ernst and Young 2015) and its integral role in the function of broadcast and media markets has seen the state take a more active (if not assertive) role. The traditional dichotomy between sport and politics is now seen an anachronism; the state maintains more than a passive interest in all aspects of sport. In football, as elsewhere, the attention of the state has been engaged following particular shocks to the status quo. The most sizeable shock to the self-regulatory 'club' world of football was the Hillsborough disaster in 1989.

Hillsborough and the 'Crisis' of Self-Regulation

Hillsborough, the home ground of Sheffield Wednesday FC, is the site of Britain's most fatal sporting disaster. In an FA Cup semi-final between Liverpool and Nottingham Forest in April 1989, 96 supporters died and

over 700 more were seriously injured following a crush in the two central 'pens' of the Leppings Lane stand. The subsequent public inquiry into the disaster, led by Lord Justice Taylor, identified the dilapidated state of the stadium and the operational failings of the police as the key contributing factors. The (interim) Taylor report revealed the Hillsborough disaster to be emblematic of a system that was incapable of regulating itself. It was not a tragic confluence of unforeseeable events, but an eminently preventable disaster. Taylor concluded that 'many of the deficiencies at Hillsborough had been envisaged … [but] the lessons of past disasters and the recommendations following them had not been taken sufficiently to heart' (Home Office 1990, para. 22). Nor did Taylor apportion blame, as significant parts of the local and national press reported,[1] to a 'hooligan element' of the Liverpool support containing 'ticketless and drunken thugs' (Arnold 1989) who 'literally killed themselves and others to be at the game' (McKay 1989). In a more wide-ranging and forensic analysis of all the available evidence, the Independent Panel Report (HC 581, 2012–13) published in 2012 fully exonerated the fans while identifying the culpability of the South Yorkshire Police as well as the FA, Sheffield City Council, Sheffield Wednesday FC and the emergency services in creating the conditions for the disaster and the inadequacy of their response both during and after the fateful event. It also laid bare the extent of deceit, evasion of accountability and perversion of justice across multiple levels of different public institutions involved in the 'black propaganda' campaign to besmirch Liverpool supporters and deflect blame. Never has sport's 'myth of autonomy' from politics and the state been exposed more vividly.

In spite of the supposed 'custodial' position of the football authorities, the safety of football supporters had always been a marginal concern in the 'club world' of the FA and the Football League. The erection of perimeter fencing in 1970s to contain the crowd was the most significant 'modernisation' of football stadia since their construction before 1900 (Taylor 1991). The Hillsborough disaster was the outcome of the football authorities' dereliction of duty in regard to ensuring minimal safety standards at English football grounds, based on a deep-seated apathy to the safety of football supporters (Scraton 2009). To the 96 people who perished at Hillsborough in 1989 can be added a further 181 people who lost their lives in disasters at UK football grounds during the twentieth century (Darby et al. 2005). Comparatively, British football has one of the worst safety records of any developed or developing nation (Inglis 1996). While a lack of record keeping inhibits an accurate overview of the injury

rate amongst football spectators, local newspaper reports of various 'near-misses' evidence the harm people were routinely subjected to when watching football, particularly after the increase in post-war match attendance (Williams 2011). Nor was there wholesale ambivalence about the safety and comfort of football supporters; following the 1946 Burnden Park disaster, the (Liverpool) Evening Express commented that just six months after the end of World War II 'the thought that men and women should be suffocated and trampled to death in the atmosphere of sport is distressing beyond words' (cited in in Williams 2011: 219). More than 40 years later, the first chapter of Lord Justice Taylor's final report opens with the following sentence:

> It is a depressing and chastening fact that mine is the ninth official report covering crowd safety and control at football grounds. After eight previous reports and three editions of the Green Guide,[2] it seems astounding that 95 people[3] could die from overcrowding before the very eyes of those controlling the event. (1990, para. 19)

This apathy, argues Johnes (2004: 134), 'was rooted in a desire to exclude sport from legislation … in the characterization of fans as hooligans and in the exclusion of the safety of football fans from the concerns of central government'. Football and sport more generally, was not so much low politics as *non-politics*. The British state traditionally took a decidedly apolitical stance to the game and its governance.

Hillsborough shook the self-regulatory foundations of football to its core. The publication of the final Taylor report was a watershed moment in the governance of football. In one sense, it signalled a re-regulation of football, especially in terms of crowd management in and around stadia. Its key recommendations were the introduction of all-seater stadia for the top two divisions in England (now the Premier League and the Championship) and the removal (or diminution) of perimeter fences. Taylor's findings came in the wake of another public inquiry into crowd safety following Bradford City fire and Heysel disaster in 1985 and a spate of non-football catastrophes exhibiting a similar pattern of underinvestment and regulatory laxness: the sinking of 'Herald of Free Enterprise' car ferry and the King's Cross Underground fire in 1987 and the Piper Alpha oil rig explosion and Clapham Junction rail crash in 1988 (Taylor 1991). Examining this 'litany of disasters' (Taylor 1991: 17), Handmer and Parker (1992) argue that two common themes emerge: a persistent failure to learn from

previous errors and take notice of warnings and near misses; and strong institutionalised resistance to change by both public and private institutions. Handmer and Parker (1992) argue that under the Thatcher administrations in the 1980s, which had inherited an already weak regulatory environment, the rise of a political orthodoxy stressing free enterprise, increased competition, expenditure constraint and deregulation devalued the importance placed on health and safety by both the public and private sector, bringing forth the 'disaster decade'. In this context, the remit of the Taylor inquiry was extremely wide, encompassing crowd control and safety at sports events of all kinds as well as existing football-related legislation.

In considering the future of English football, Taylor decided not to support the introduction of the controversial membership card scheme (provided for by the Football Spectators Act 1989), which viewed the problems of football exclusively through an law and order lens and sought to impose a 'strong state' response through an authoritarian regulatory regime over football supporters (Gamble 1988a). Taylor's recommendations, however, did include the expansion of other modes of surveillance and regulation, such as the increased use of CCTV at football stadia, extension of the legal power to ban individuals from football matches, prohibition of unauthorised selling ('touting') of tickets, criminalising encroachment onto the pitch and the electronic tagging of people convicted football-related offences. While ostensibly aimed at improving crowd safety, all-seated stadia had long been touted as the answer to the disorder and financial problems of football; through deterring and restricting the movement of the 'hooligan element' and concomitantly attracting a new type of 'family audience' (Whannel 1979).

The implementation of Taylor's recommendations, enacted through The Football Offences Act 1991 and The Criminal Justice and Public Order Act 1994, meant that football stadia became one of the most surveilled, regulated and policed spaces in the urban landscape (Giulianotti 2011). A number of supporters groups have campaigned against the (over)regulation of football fans and the enforcement of constrictive legislation, which they argue not only sanitises the experience of watching football but also criminalises a wide range of activities and behaviours that are not deemed illegal in other settings (Hopkins and Treadwell 2014). Of particular concern has been the police's power to restrict the freedom of movement through the application of banning orders, without a fair trial or criminal conviction, and the use of 'bubble matches', where all away

fans must travel on licensed coaches and under police escort, from designated pick-up and drop-off points (Lloyd 2012). However, the intensive social control of supporters' behaviour, consumption and movement stands in direct contrast to the regulation of the clubs, which, post-Taylor has remained relatively light-touch.

Enforcement and compliance with the rules on crowd safety is operationalised through a certification regime, under the Sports Grounds Safety Authority (SGSA).[4] Introduced by the Football Spectators Act 1989, this represented a limited technocratic incursion into the self-regulatory arena of football, which introduced an advisory body with a narrow remit and limited powers; a typically British 'non-political' form of intervention (Hargreaves and Allison 1986: 255). It represented a move from true self-regulation to 'enforced self-regulation' (Braithwaite 1982) where the SGSA, as the national regulator, issues licences and oversees the role of local authorities in ensuring the maintenance of safety standards at the 92 football grounds in England and Wales. The regulation of crowd safety, therefore, remains largely subject to the internal control systems of the individual clubs, under licence from the local authority, which is itself subject to 'regulation inside government' (Hood et al. 1999).

Enforcement and compliance continued to be shaped by the key watchwords of the British regulatory tradition. As an 'effective light-touch regulator' the SGSA 'seeks at all times to proceed by means of *advice*, *persuasion*, and *agreement* and our statutory powers will only be used as a last resort' (2015b: 2, my emphasis). Hence, while the regulation of clubs (in terms of their health and safety obligations) has become more formalised in statute, the regime has continue to operate according to the principles of trust and light-handedness. The SGSA promotes a risk-based certification regime, 'which places the responsibility for determining how to provide for spectator safety with ground management rather than being prescribed by local authorities', despite an increase in the number of spectator injuries in recent years (SGSA 2015: 7). The transition to enforced self-regulation via the FLA and now SGSA has relegitimised a discredited system of club regulation. The re-regulation of football has been limited to the introduction of a risk-based, light-touch certification regime that has impinged little on the operational management of the clubs; this has been accompanied by the deregulation of corporate and financial governance that facilitated the pervasive commercialisation of English football.

Deregulation and Commodification

Post-Hillsborough, the trajectory of English football has been one of deregulation as well as re-regulation. As Brown (1998) argues, the moment of crisis created by Hillsborough was exploited by actors in football and the government to legitimise a number of 'modernising' reforms that have led to significant and lasting changes in the economy and the governance of football. Hillsborough was narrated as a crisis of 'old' football, rather than the fundamental nature of the game's self-regulatory regime. Just as the 1978 'Winter of Discontent' was constructed by the New Right to garner support for an alternative to Keynesian social democracy, so too has the new era of modern football been set against a comparable period of crisis beginning in the mid-1970s and reaching its nadir in 1985[5]; this 'annus horribilis' (Russell 1997: 206) was marked by the televised Luton-Millwall riot and the Bradford and Heysel disasters—a season, rather than a winter, of discontent so to speak. The public image of the sport (and its supporters) was tarnished to such an extent that the BBC and ITV chose not broadcast any live coverage of football the following season, which also has the ignominy of recording the lowest overall match attendance since the expansion of the Football League in 1922 (Conn 2012). The opprobrium of politicians and the media was mainly reserved for supporters; a Sunday Times (1985) editorial characterised English football as 'a slum sport played in slum stadiums and increasingly watched by slum people, who deter decent folk from turning up'. The crisis of the 'people's game' was attributed to the moral decay of *people* who watched it, rather than the decisions (or more accurately non-decision-making) taken by elite who governed the *game*.

The crisis of English football can be placed in the broader context of the unravelling of post-war collective certainties. For many, the degeneration of English football one of the numerous perverse consequences of the permissiveness propagated by the Keynesian welfare state. In 1989, The Economist claimed: 'the game is irredeemably tied to the old industrial north, yobs and slum cultures of the stricken inner cities—everything in fact that modern Britain aspires to put behind it'. This narration of football's crisis put forward a set of clear remedies: change the environment of football stadia in order to attract a more affluent, middle-class clientele.

Post-Hillsborough, the owners of the top flights clubs seized upon the opportunity created by the Taylor report to put forward a narrative of English football based on a more commercial, consumer-orientated

approach. The problems of the old order were interpreted to be the result of *too much* regulation rather than *too little*. Post-Taylor, there was an acceleration of the deregulatory tendencies that had been in progress since the early 1980s. In a purposive attempt to protect the 'sporting heart' of football clubs from being hijacked and subverted by commercial interests the embryonic FA imposed rules in the late nineteenth century that allowed clubs to form limited companies in order to finance the development of grounds and playing staff; but, prohibited directors from being paid, restricted the value of shareholder dividends to 5 % of the shares face value (increased to 7.5 % after 1918), and prevented asset-stripping by requiring that any liquidated proceeds must be distributed to sporting charities when a club is wound-up (Conn 2007). Later codified as the FA's Rule 34, these restrictions represented the institutional manifestation of the conservative notion of responsibility of football's governing body.

In 1981, the FA relaxed the restrictions so that clubs could pay a salary to one full-time director and in the following year doubled the maximum of shareholder dividend to 15 %, in the hope that this would help attract a better calibre of director who in turn would improve the financial governance of the often amateurishly run clubs (Goldblatt 2015: 11). This deregulation did attract a more entrepreneurial type of director, such as David Dein at Arsenal and Martin Edwards at Manchester United, who viewed football according to the same rules as the rest of the business world, rejecting any notion of 'civic responsibility' towards clubs as a kind of 'public utility' (Taylor 2013). One of these 'new breed' was property developer Irving Scholar, the chairman of Tottenham Hotspur; in 1983, he circumvented Rule 34 entirely through the creation of a holding company (with the club as a subsidiary) enabling him to launch a stock market floatation (DCMS 2011). Other clubs wanting to list on the stock market, such Aston Villa, Manchester United and Newcastle, followed the same financial strategy without comment or sanction from the FA.

The response of the FA to this practice, which constituted some creative legal and financial engineering at best and outright chicanery at worst, was deafening in its silence. Faced with the prospect of football clubs being used for the first time as vehicles exclusively for profit-making, the FA did not seek any advice from financial experts, nor did it publicly defend its rules or engage in any internal debate or external consultation about whether there was a need to modernise the rule book in order to adapt to changing economic circumstances, let alone issue any warnings or sanctions for the transgression of their own rule book. The abdication

of duty by the FA as football's governing body was total; it even failed to respond to a letter from Scholar outlining his plans (Goldblatt 2015). The regulatory approach of the FA was not so much light-touch, or even 'limited touch' (Brown 2007), but 'no-touch' (Sharma 2011: 346). One can only speculate why the FA took this laissez-faire position: they did not offer any explanations at the time, nor since. It would be surprising if the wider political climate of that period in the mid-1980s did not have some impact on their thinking; perhaps they did not want to be perceived as guardians of some cosy and consensual social democratic old order, in the same light as the other 'wreckers', such as trade unions, in the new dawn of the Thatcherite era. The 1983 Chester Report had already advocated an end to the redistribution of income from the top to the bottom of the Football League, arguing that it was essentially a distortion of the natural market of football that unfairly weakened the bigger clubs while creating a moral hazard by keeping 'poor clubs … in existence irrespective of the reason for their penury' (Chester 1983: 38). The inertness of the FA certainly chimed with the anti-interventionism of the time, epitomising the sentiment of Ronald Reagan's dictum: 'Don't just do something, stand there.'

It is instructive to view the institutional history of the FA in the wider tradition of regulation in Britain. The FA had never been required to actively enforce compliance with its rules before. The club regulation of football rested on its members trusting each other to observe the informal rules of the game. Instances where the FA took action to limit the extent of commercialisation in football (such as the rejection of Coventry City's plan to rename the club Coventry-Talbot in a £250,000 deal with the eponymous car manufacturer in 1980) are scant. The more concerted challenge to the informal rules governing football by a new breed of chairmen and directors posed a more serious issue. The FA did not possess the intellectual or human resources to respond to this innovation. The strategies of enforcement and compliance that were required were simply outside the FA's frame of reference. It was moribund in a regulatory tradition that was out of step with the political and economic dynamics of the time. Whatever the rationale of 'doing nothing', the consequences of such passivity have been evident in the intervening years.

The importance of Rule 34 was both practical and symbolic; it encapsulated the self-referential character of football and distinguished it from other types of economic activity. The circumvention of the game's self-referential rules, and the tacit complicity of the FA in that evasion, threatened the autopoiesis of the sport and represented a failure of self-regulation.

The subversion of the FA rule book did not fundamentally alter the ownership model in football[6]: between 1983 and 2001, only 25 clubs were floated on the stock market; only seven are currently listed as public limited companies (plcs) (Goldblatt 2015: 3). Financialisation, in this sense, was far from a totalising process: football clubs are invariably poor investments producing little shareholder return in the long term (BBC 2015). However, the change in the corporate governance of football gave rise to the notion that the assets of clubs (including the 'brand loyalty' of its supporters and its 'local monopoly power') could be commercially exploited for profit with impunity (Metcalfe and Warde 2002: 132).

The commercialisation of football was part of a wider campaign by bigger top-flight clubs to assert their authority over the rest of the Football League and reduce the redistribution of income from rich to poor. In 1983, the cross-subsidisation of gate receipts between clubs with varying levels of support, in which match-day proceeds were split on an 80–20 % basis between the home and away team, was abolished. Solidarity between the leagues was eroded further in 1986, when the self-appointed 'Big Five' English clubs (Arsenal, Everton, Liverpool, Manchester United and Tottenham) were successful in securing a higher proportion of television revenue for the then First Division and a reduction in the levy that was shared evenly between all the 92 league teams. These more favourable terms for the big clubs were ratified by the Football League under the threat of a breakaway 'Super League'. In an echo of the wider processes of deregulation that were happening elsewhere in the economy, especially financial services in The City, Martin Edwards, then chairman of Manchester United, described the proposed formation of a new self-governing elite league as the 'Big Bang' in football (King 2002).

The deregulation of football governance and the system of sporting solidarity that bound the 92 clubs of the Football League together were important precursors to the advent of the Premier League and the bonanza of subscription-based satellite television in 1992. In the aftermath of the Taylor inquiry, both Football League and the FA published separate reports in response. The Football League report—One game, One Team, One Voice—argued that the social solidarity of the game should be reaffirmed, with the Football League and FA merging into a single authority. Viewing such unity as a threat to its administrative pre-eminence, the FA, in its *Blueprint for the Future of Football*, backed the proposal of a FA-controlled Super League in a strategic attempt to emasculate the power of the Football League and reaffirm its status as 'the highest

parliament in English football'. This provided the legitimacy the big clubs and Rupert Murdoch's British Sky Broadcasting[7] (BSkyB) needed to push through the creation the Premiership.

The economic impact of the change was dramatic. In 1986 the Football League received £6.3 million for the rights to broadcast 28 games over two seasons; the entry of British Satellite Broadcasting into the bidding process in 1988 inflated this figure to £44 million over four years. However, in 1992 the newly formed FA Premier League signed a groundbreaking deal with Sky Sports worth £304 million for exclusive live coverage of 60 top-flight games over same period (Crawford 1996). The pace and scale of the commercial expansion of English football since then is staggering: broadcasting revenue increased by over a 1000 % in the first 20 years of the Premier League (Purslow 2013). In revenue terms, the Premier League is comfortably the biggest football competition in the world, with an annual income (£3.3 billion) that is more than double that of the other major leagues in Germany, Spain and Italy[8] (Ernst and Young 2015).

For advocates of the Premier League, the influx of money into English football has been a resounding success. It has facilitated capital investment in stadium development and safety and enhanced the quality of the 'product' on display by attracting some of sport's global superstars. The proof of its success, argue the Premier League, is evidenced by steadily increasing attendances; despite the availability of live football on television 14 million fans attended a top-flight game in the 2013–14 season with the highest average attendance (36,695) since 1949–50 (Premier League, 2014). One commentator goes as far as to describe Sky's symbiotic relationship with the Premier League as 'the greatest romance in modern sport' (Briggs 2011).

The nature of football's economic miracle has proved deeply divisive and its impact is fiercely contested among the game's various stakeholders. It is posited that the reinvention of English football, which 'began to hum to the new rhythms of global capitalism' (Williams 2001: 147), alienated many traditional supporters as well as appealing to new types of fan, sponsors and investors (Taylor 2013: 336). The transformation of football is seen to have entrenched and widened inequality between clubs, reducing the competitive balance both within the top-flight and between the leagues. The increasing expense of ticket prices (which have risen by 700 % since 1992) is claimed to have socially excluded many demographic groups, particularly the young and the old, from attending football matches (Conn 2011). Others have decried the unsustainability of the dominant economic model in football, with clubs invariably failing to turn

ever-rising income into an operating profit, with levels of indebtedness and insolvency increasing at the same time as growing investment in the sport.

Deregulation has led to a marked increase in the financial vulnerability of clubs to the malfeasance, incompetence and sheer egomaniacal ambition of some highly dubious individuals on the basis of specious claims and promises. This has resulted in the collapse of a number of clubs, especially in the lower reaches of the football pyramid, at the hands of carpetbaggers, money launderers and convicted fraudsters. Although clubs were far from profitable enterprises, after 1922 insolvency was almost unknown in English football; the demise (and subsequent rise) of the 'phoenix' clubs like Accrington Stanley and Bradford Park Avenue in the 1960s and 1970s were infamous due to the rarity. Since the mid-1980s, however, more than half of the clubs in the Football League have gone into administration, a number more than once. Beech et al. (2010) argues that in the casino of the new football economy insolvency has now become a viable financial strategy for less scrupulous club chairman and directors; facilitated by the football creditors rule, which ensures that in the case of insolvency priority is given to the full payment of players wages and debts to other clubs at the expense of unsecured creditors—often including HM Revenue and Customs (HMRC), small local businesses, supporters, local schools and St John's Ambulance—who invariably recover only a small fraction of what they are owed (R3 2015).

The deregulation of the football economy has been justified using the same logic of 'there is no alternative' as in other areas of British industrial and economic life, such as public utilities and The City, where global competitiveness is depicted as the ultimate driver. The invocation of this 'logic of no alternative' (Watson and Hay 2003) can still be witnessed today: Richard Scudamore's, chief executive of the Premier League, advocacy of a '39th game' to be played aboard (see Millward 2011) was based on the notion that in 'a fiercely competitive cultural marketplace' there is 'a globalisation of sport we cannot deny' (Montague 2010; Oliver 2008).

Football's Legitimation Crisis: The Rise of the Participatory Tradition

The prevailing power structures of football, along with other enduring features of the Victorian era, are increasingly seen as anachronistic and have been subject to growing challenge and contestation in recent years. The legitimising mythology of 'the people's game' notion that

those in charge are benevolent custodians, been undermined as football has become increasingly 'commodified, professionalised and embourgeoisified, leaving the game's core working-class supporters marginalized and alienated' (Taylor 2007: 6). While it is true that clubs have always had commercial imperatives and directors and chairman who looked to make personal gains (either financially, socially or politically), such ulterior motives were generally hidden away from public view and obfuscated by their self-styled role as the moral guardians of the game. The inclination of club owners and directors to construct and perpetuate this veneer of legitimacy has declined as many clubs sought to market themselves as unabashed profit-making machines. In this sense, the change in football was rhetorical rather than structural: although Ian Taylor characterises football clubs as 'participatory democracies' (1971), in reality they had always been closed, secretive and elitist. The key difference was that in the era of (hyper)modern football, many of the core ideational assumptions underpinning the conservative responsibility of football's 'guardians' have been brazenly trampled on.

In the post-war era, the passion and active participation of the football crowd on the terrace was matched by their passivity and ambivalence to the way in which the game was run (Critcher 1971; Cleland 2010). While fans may have regarded themselves, however illusorily, as authentic members of the football club, there is little evidence of active engagement or agitation on their behalf (Critcher 1979). The very notion of a football *supporter* was premised on a sense of deep emotional attachment and loyalty and thus antithetical to any serious challenge to *their* club. Football was emblematic of the wider 'deferential civic culture' (Almond and Verba 1963); the general acquiescence of football supporters with the existing power structures of football mirrored the relationship between the citizen and the state in Britain (Taylor 2007). Conversely, the rise of football hooliganism was interpreted as symptomatic of the disintegration of this deferential civic culture in the 'discontented, quarrelsome, unsteady, ineffective, self-defeating' 1970s (Beer 1982: 111).

While the broader decline in deference is important contextually, the changes in structure and finance of English football have led to a recasting of the relationship between club and supporter. The nature of this relationship has changed from one based on club-fan model to one more analogous with the transactional relationship between a conventional business and a consumer. Evidence submitted to the Culture, Media and Sport Select Committee on Football Governance (DCMS 2011) observed:

> the pendulum in English football has swung far too much towards commercial objectives as opposed to the social, cultural and sporting objectives that originally defined the very reason for existence of the first football clubs. Fans are now *customers*, clubs are now *enterprises*, and football is in the *entertainment* industry.

It is moot how far football clubs in England were ever social institutions (i.e., clubs in the truest sense of the word) following the legalisation of professionalism and the corporatisation of clubs into limited liability companies. Notwithstanding the floatation of clubs on the stock market, the increasing commercialisation of the relationship between the club and the supporter does not represent a fundamental change in the underlying business structure of football, as they had always been entertainment enterprises with an economic imperative (Collins 2013). What was crucial was that in the midst of the English game's multiple crises, *some* football fans began to take a more critical position to their relationship with their clubs and the national governing bodies. Giulianotti (1999) introduces the concept of the 'post-fan' to describe the emergence of 'a new … critical kind of football spectator', drawing on Urry's (1994) conception of the 'post-tourist', as well as having obvious parallels to Norris' (1999) work on 'critical citizens'. These post-fans are more reflexive and discerning in their consumption of football, and tend to be portrayed as better educated and more affluent, than the idealised 'traditional' supporter. However, it is argued here that the emergence of the post-fan is based on a growing realisation that the existing power structures fail to adequately represent their interests as patrons and supporters of football, rather than any significant change in the demographic composition of the football crowd.[9]

While the paternalistic culture, underpinned by the conservative notion of responsibility, has been eroded by the commercialisation and commodification of football, its governance structures have not become more representative or participatory to accommodate the transformation in football finance. Indeed, the creation of the FA Board and then the Professional Game Board has only served to limit the mechanisms of representation and participation further. Power in football is now more firmly concentrated in the hands of the 'big' (i.e., wealthy) top-flight clubs than ever before. The incongruence between the legitimising mythology of the 'people's game' and the lack of representation, transparency and accountability in football's governance structures has become increasingly apparent. The

All Party Parliamentary Football Group report on English Football and its Governance (2009) commented that:

> In football, business is generally conducted behind closed doors, even to the extent now that some huge transfer fees aren't disclosed to the fans who are, in the end, going to have to foot the bill. This leads to a distinct lack of accountability. We believe that the best way to tackle this lack of accountability is for clubs to involve supporters in their governance.

The crisis for the football is one of legitimacy. An increasingly large proportion of football supporters are unwilling to accept the legitimacy of the football authorities to act in the best interests of the whole game. The mentality of the post-fan, while often ironic and knowing in relation to the constructed reality of the modern (televised) football spectacle is also inclined to favour more participatory types of governance and democracy. There has not been 'a loss of control over the game' (Taylor 2007: 7), at least not in any empirical sense; supporters and other stakeholders never had any modicum of control in the first place. Rather, a growing consciousness among supporters has emerged about the need to exert a greater influence over running of their clubs and more recently the national game. We can understand these supporter-led movements, which began to emerge in the mid-1980s, as examples of 'fan democracy' (Brown 1998) in the participatory tradition.

The establishment of the Football Supporters Association (FSA) in the wake of Heysel in 1985, was an attempt by fans to try influence the national debate on football. It sought to offer a more participatory and inclusive vision of football to counter the increasingly commercial narrative emanating from the nexus of interests cohering around the big clubs and the media companies. The creation of the FSA at the national level was accompanied by the emergence of football fanzines and more latterly online fan forums, which provided supporters with sites of 'cultural contestation' through which to challenge the game's modernisation and organise protest and resistance (Jary et al. 1991). In the aftermath of the Taylor report on Hillsborough, which had highlighted the lack of supporter inclusion in decision-making and the weak leadership of the FA, the FSA was partially successful in getting the football authorities to at least acknowledge the views and interest of the 'ordinary' fan.

In this more politicised climate, questions of control and ownership have come to the fore in the debate on the future of football. In a debate in

the House of Lords on ownership and governance of football clubs Lord Faulkner (HL Deb 3 July 2002, vol 637, col. 326), a lifelong Wimbledon supporter and member of the Dons Trust, argued that:

> Directors and owners should see themselves primarily as guardians of a public asset, as temporary custodians of an entity in which others, such as supporters and the local community, have a genuine stake. In the case of Wimbledon, the club existed for over 100 years before the present owners took it over. It is therefore not just another investment for them to do with what they like.

The implication of such normative statements is that such a custodial disposition on the part of chairmen and directors can no longer be assumed. However, those in charge of football—notably the FA and the Premier League—continue to adhere, publicly at least, to the legitimising mythology of moral guardianship. In response to questions about reform of the FA's governance structure, Richard Scudamore asserted that 'the essence of the FA has to be a representative body where representatives of the game come together in an association to try and do what is in the best interests of the whole game' (DCMS 2011: 22). The notion of the FA as 'an association of interests' is employed as a strategic narrative to defend the economic interests of the top Premier League clubs. The legitimation function of these narrative constructs is diminishing, however, in an environment of external pressure from both supporters' groups and Parliament.

Football's crisis of legitimacy has created a dilemma for government: how do they remedy the apparent problems without resorting to legislation and regulation, and thereby maintain the 'myth of autonomy'? As Houlihan observes, 'The nature of central government intervention is affected by a tradition which seems to have combined, on the one hand, a desire to leave sport and recreation as a sphere of private life and, on the other, a clear inability to do so' (Houlihan 2002: 49).

On coming to power in 1997, the New Labour government commissioned the Football Task Force (FTF) to examine fundamental issues in the governance of game, such as the lack of supporter involvement in clubs, the conflict created by the financialisation and globalisation of football and the game's relationship with the wider community. The remit of the FTF chimed with the communitarian agenda of the New Labour at the time. Although such the decentralising impulses of the New Labour

government became much less prominent at it sought coordinate a number of public service reforms from the centre, the work of the FTF led to a concrete outcome in the area of supporter participation: the establishment of Supporters Direct (SD) to provide advice and resources to facilitate greater supporter involvement in the governance of football clubs. The work of SD has had an important impact on the role of supporters in football; over 170 supporters' trusts have been set up since 2000. The creation of SD in 2000 was therefore an indirect mechanism employed by the government to try and steer the ownership structure of football without recourse to direct, statutory regulation. It can therefore be seen as a move away from tacit self-regulation to more facilitated self-regulation (Bartle and Vass 2005).

The organisational form of supporter trusts, in terms of their cooperative governance structure and the democratic one-member one-vote principles on which they are based, offer a direct challenge not only to the traditional governance of football in England, but also to the broader culture and dominant traditions in British politics. They provide supporters with a mechanism to actively pursue their rights as stakeholders, 'providing them with an opportunity to influence the direction of their club … and to transform the power of their voice from one that can be heard, to one that is listened to' (Morrow 2003: 52). The activities of supporters trusts represent a move towards a more European model of sport based on democratic principles and are recognised as helping to deliver wider benefits to society more generally, such as active citizenship (Supporters Direct Europe 2012).

However, while important at club and community level the increasing activism of supporters has not led to any significant changes in football's national power structures. The governance of football continues to represent a Victorian club culture: elitist, secretive, informal and closed. Bartle and Vass claim that it is 'more or less unthinkable' for a contemporary professional organisation to operate according to the classic self-regulatory principles of the nineteenth century (Bartle and Vass 2005: 21). While no longer purely self-regulatory, football has not moved very far along the spectrum. As a result, football is beginning to look increasingly isolated amongst the 'cultures of cascading targets' that characterise many other sectors in the 'audit society' of contemporary Britain (Richards 2008; Power 1999).

Analysing the future prospects for the reform of football governance is fraught with complexity and uncertainty. The increasing politicisation

of football and the growing activism of supporters are likely to continue to put pressure on the football authorities for change. The most likely outcome is the FA and more importantly the Premier League will agree to small amendments to internal regulations and a greater formalisation of rules to obviate the need for direct intervention. Such conciliation may well satisfy supporters and the government, and preserve football's self-regulatory nature. However, if the game's power brokers gamble and try and call the bluff of supporters and the government, calls for state regulation will be renewed. As Andy Burnham argued: 'In this vacuum … public debate will grow on how we save football from itself' (Jackson and Maltby 2003: 17).

Conclusion

Professional football in England has undergone a major transformation in the last two decades. Firstly, the finance of football has been thrust full-throttle into the era of late modern capitalism. Rampant commercialisation and commodification and integration into the international marketplace have produced some distinct winners and losers in the globalisation of football. Inequality, in terms of both the relative economic position of clubs in the football pyramid and the ability of different demographic groups of fans to experience live football, has dramatically increased. The concentration of playing and economic power in the hands of the so-called super-clubs is likely to have a decisive influence on any proposed changes to the governance of football (King 2010). Secondly, football fandom has not been exempt from the transition from a deferential civic culture to a 'networked society' (Castells 2011) in which citizens have higher expectations, are better educated, more affluent, and have access to a wider range of information sources than ever before. In this climate, the traditional legitimising notions of the 'people's game' and putative moral guardianship of football authorities have been demystified.

In this context, there is an increasing dissonance between the contemporary 'everyday' discourse on football (fan) democracy and the functioning of its governance regime, predicated on a nineteenth-century model of representation and responsibility. In an era of supposed institutional and regulatory crisis, the football authorities have managed to retain most of their self-regulatory privileges intact. Reflecting the broader culture of the British political tradition, the governance of football has remained inherently elitist, with only minimal participation, transparency

and accountability afforded to the game's key stakeholders. As Richards, Smith and Hay (2014: 268) observe, 'The problem is that the "club government" model on which many of the UK's institutions operated has been revealed, but it has not been replaced by an alternative form of legitimation.' This has led to a crisis of legitimacy for football, which is making it increasingly difficult for football's ruling elites to maintain the status quo. However, political actors continue to be constrained by a tradition of non-intervention and the 'myth of autonomy' still retains rhetorical power if little empirical relevance. New Labour resisted calls for an overall 'statutory, or quasi-statutory, regulatory structure for football [which] cannot be justified' (Baroness Blackstone, HL Deb, 2002, vol 637, col. 335).

Given that football's 'crisis of legitimacy' can be linked to problems underlying other UK institutions, the dynamics of change and continuity in the governance of football are important to the broader debate about the nature of British democracy. Football is not an isolated sphere of activity, but as King observes, 'a public ritual [that] is deeply embedded into the wider institutional and political realities of which it is a conscious reflection and manifestation' (King 2010: 890). However, the relationship between sport and politics is not unilinear: football, or rather its supporters and other key stakeholders, may also act as an agent of wider change in the future. The emerging forces of fan democracy may have implications not only for the relegitmisation of football governance, therefore, but also the wider political system in Britain.

Notes

1. Based on briefings fed by South Yorkshire Police and Conservative Sheffield MP Irving Patnick.
2. A publicly funded guidance document on spectator safety at sports grounds, introduced in 1973 after the 1971 Ibrox disaster; the second and third editions were published in 1986 and 1990 after the Bradford fire and Hillsborough.
3. The 96th victim of Hillsborough, Tony Bland, died in 1993 as a result of his injuries.
4. Previously the Football Licensing Authority (FLA).
5. Curiously, these 'dark days' of football were also the most decorated era in British football: between 1974 and 1985 a clutch of British teams (including less storied clubs such as Derby County, Notts Forest, Aberdeen and Dundee Utd) contested 16 European finals and won seven European cups, two Cup Winners Cups (CWCs) and three UEFA Cups (Goldblatt 2015:

10). Despite the influx of money into the self-styled 'best league in the world', Premier League clubs have only managed a comparatively modest four Champions League trophies, two UEFA (Europa League) Cups and three (now disbanded) CWCs, in the 25 years since the lifting of the Heysel ban on English clubs in 1990.

6. The one major caveat to this is the leverage buyout of Manchester United by Malcolm Glazer in 2005. In the face of fierce opposition from the fans and directors of the clubs, Glazer increased his shareholding to 75 % enabling him to launch a takeover bid and delist the club from the stock exchange. Most of the capital used to purchase the club was from loans, secured against the club's assets.
7. Following the merger of British Satellite Broadcasting and Sky Television in 1990.
8. While English football has experienced a 'boom', it is important not to overstate its relative economic weight. The entire turnover of the whole professional football industry in England would only place it towards the bottom of the FTSE 500. In in the bumper 2013–14 season, where clubs were boosted £1.56 billion from by the record-breaking broadcasting deal (worth £5.5 billion over five years), the combined turnover of the two biggest grossing clubs, Manchester United (£433.2 million) and Manchester City (348.3 million), was eclipsed by that of their academic neighbour, the University of Manchester (£886 million).
9. Malcolm et al. (2000) show that there has been a broad level of continuity in the demographic make-up of football crowds since the creation of the Premiership in 1992, with only limited increases in the proportion of women, middle class, families and ethnic minorities attending matches.

Bibliography

Allison, L. (1986). *The politics of sport*. Manchester: Manchester University Press.

Almond, G. A., & Verba, S. (1963). *The Civic culture: Political attitudes and democracy in five nations*. Princeton, NJ: Princeton University Press.

Arnold, H. (1989). The truth. *The Sun*, April 19.

Baker, N. (2004). Whose hegemony? The origins of the amateur ethos in nineteenth century English society. *Sport in History, 24*(1), 1–16.

Bartle, I., & Vass, P. (2005). *Self-regulation and the regulatory state: A survey of policy and practice*. Centre for the Study of Regulated Industries, University of Bath School of Management.

BBC (2015). Football's Billions, Bottom Line, BBC Radio 4, 19 March 2015

Beer, S. (1965). *Modem British politics: A study of parties and pressure groups*. London: Faber

Beer, S. H. (1982). *Britain against itself: The political contradictions of collectivism*. Faber & Faber.

Boin, A., & Hart, P. T. (2000). Institutional crises and reforms in policy sectors. *Government institutions: Effects, changes and normative foundations, Springer*, 9–31.

Braithwaite, J. (1982). Enforced self-regulation: A new strategy for corporate crime control. *Michigan Law Review, 80*, 1466–1507.

Briggs, S. (2011). How Sky Sports dragged football back from the dark days of the eighties. *The Telegraph*, April 19.

Brown, A. (1998). United we stand: some problems with fan democracy. In Brown, A. (Ed.) *Fanatics!: Power, identity, and fandom in football*. London: Routledge.

Brown, G. (2007). *Speech by the chancellor of the exchequer*. London: Mansion House. Retrieved from http://www.hm-treasury.gov.uk/press_68_07.htm.

Castells, M. (2011). *The rise of the network society: The information age: Economy, society, and culture*. John Wiley & Sons.

Chester, N. (1983). *Report of the Committee of Enquiry into Structure and Finance*, Lytham St Annes.

Cleland, J. A. (2010). From passive to active: The changing relationship between supporters and football clubs. *Soccer & Society, 11*(5), 537–552.

Collins, T. (2013). *Sport in capitalist society: A short history*. Routledge.

Conn, D. (2007). What money can't buy. *The Guardian*, July 29.

Conn, D. (2010). *The beautiful game?: Searching for the soul of football*. Random House.

Conn, D. (2011). The Premier League has priced out fans, young and old. *The Guardian*. Retrieved from http://www.theguardian.com/sport/david-conn-inside-sport-blog/2011/aug/16/premier-league-football-ticket-prices

Conn, D. (2012). Follow the money. *London Review of Books, 34*(16), 25–27.

Conway, R. (2014). Greg Dyke: FA Council overwhelmingly male & white. *BBC*. Retrieved from http://www.bbc.co.uk/sport/0/football/28499047

Crawford, G. (1996). *Fact Sheet 8: British football on television*. University of Leicester. Retrieved from http://web.archive.org/web/20110606080220/http://www.le.ac.uk/sociology/css/resources/factsheets/fs8.html

Critcher, C. (1971). Football and cultural values. *Center for Contemporary Cultural Studies Working Papers, 1*, 113–119.

Critcher, C. (1979). Football since the war. In J. Clarke, C. Critcher, & R. Johnson (Eds.), *Working class culture*. Birmingham: University of Birmingham.

Darby, P., Johnes, M., & Mellor, G. (2005). *Soccer and disaster*. Psychology Press.

Diamond, P. (2014). A crisis of Whitehall. In D. Richards, M. J. Smith, & C. Hay (Eds.), *Institutional crisis in 21st century Britain*. Basingstoke: Palgrave Macmillan.

Ernst and Young. (2015). *The Premier League: Economic impact analysis*. London: Ernst and Young.
FA. (2013). *Finding the founding fathers*. Retrieved from http://www.thefa.com/news/2013/oct/finding-the-founding-fathers
Gamble, A. (1988a). *The free economy and the strong State: The politics of Thatcherism*. Hampshire and London: Macmillan Education Ltd.
Garland, J., Malcolm, D., & Rowe, M. (2000). The future of football. *Challenges for the twenty-first century, Soccer and Society I (I) (Special Issue)*. London.
Giulianotti, R. (1999). *Sociology of the global game*. London: Routledge.
Giulianotti, R. (2011). Sport mega events, urban football carnivals and securitised commodification: The case of the English Premier League. *Urban Studies, 48*(15), 3293–3310.
Glanville, B. (1955). *Soccer nemesis*. Secker & Warburg.
Goldblatt, D. (2015). *The game of our lives: The making and meaning of English football*. London: Pengion Random House.
Handmer, J. W., & Parker, D. J. (1992). Hazard management in Britain: Another disastrous decade?. *Area, 24*(2), 113–122.
Hardaker, A., & Butler, B. (1977). *Hardaker of the League*. Pelham.
Hargreaves, J., & Allison, L. (1986). The state and sport: Programmed and non-programmed intervention in Britain. In Allison, L. (Ed.) *The Politics of Sport*. Manchester: Manchester University Press (242–261).
Hobsbawm, E., & Ranger, T. (2012). *The invention of tradition*. Cambridge University Press.
Hood, C., James, O., Scott, C., Jones, G. W., & Travers, T. (1999). *Regulation inside government: Waste watchers, quality police, and sleaze-busters*. Oxford University Press.
Hopkins, M., & Treadwell, J. (2014). *Football hooliganism, fan behaviour and crime: Contemporary issues*. Palgrave Macmillan.
Houlihan, B. (2002). *Sport, policy and politics: A comparative analysis*. Routledge.
Houlihan, B., Bloyce, D. & Smith, A. (2009). Developing the research agenda in sport policy. International Journal of Sport Policy and Politics, *1*(1), 1–12.
Inglis, S. (1996). *Football grounds of Britain*. Collins Willow.
Jackson, M., & Maltby, P. (2003). *Trust in football*. London: Institute for Public Policy Research.
Jary, D., Horne, J., & Bucke, T. (1991). Football 'fanzines' and football culture: A case of successful 'cultural contestation'*. *The Sociological Review, 39*(3), 581–597.
Johnes, M. (2004). 'Heads in the sand': Football, politics and crowd disasters in twentieth-century Britain. *Soccer & Society, 5*(2), 134–151.
King, A. (2002). *End of the terraces: The transformation of English Football*. Bloomsbury Publishing.

King, A. (2010). After the crunch: A new era for the beautiful game in Europe? *Soccer & Society, 11*(6), 880–891.
Kingdon, J. (2003). Agendas, alternatives, and public policies. London: Longman.
Lloyd, P. (2012). *Criminalising football fans: The case against 'bubble' matches.* Available at: http://manifestoclub.info/wp-content/uploads/mc-bubble-match-briefing-doc-02.pdf
MacLean, M. (2008). Evolving modern sport. *Journal of Sport History, 35*(1), 49–55.
Mason, T. (1981). *Association football and English society 1863–1915.* Harvester.
McKay, P. (1989). *Evening Standard.* April 17.
Metcalfe, J. S., & Warde, A. (2002). *Market relations and the competitive process.* Manchester University Press.
Michie, J., & Oughton, C. (2002). Regulatory issues and industrial policy in football. In Metcalfe, S. and Warde, A. (Eds.) *Market relations and the competitive process.* Manchester: University of Manchester Press.
Millward, P. (2011). *The global football league: Transnational networks, social movements and sport in the new media age.* Palgrave Macmillan.
Montague, J. (2010). Why soccer should fear the NBA. *CNN.* Retrieved from http://edition.cnn.com/2010/SPORT/football/10/07/football.nba.fear.world/
Moran, M. (2003). *The British Regulatory State: High modernism and hyper-innovation: High modernism and hyper-innovation.* Oxford University Press.
Morgan, K. O. (1990). *The people's peace: British history, 1945–1989.* Oxford University Press on Demand.
Morrow, S. (2003). *The people's game?: Football, finance and society.* Palgrave Macmillan.
Norris, P. (1999). *Critical citizens: Global support for democratic government: Global support for democratic government.* New York: Oxford University Press.
Office, H. (1990). *Inquiry into Hillsborough Stadium Disaster (Taylor Inquiry): Evidence, papers and report.* London: HMSO.
Oliver, B. (2008). Tomorrow's world. *The Guardian*, February 10.
Perkin, H. (1990). *The rise of professional society: England since 1880.* Psychology Press.
Polley, M. (2006). The amateur ideal and British sports diplomacy, 1900–1945. *Sport in History, 26*(3), 450–467.
Porter, D. (2004). Your boys took one hell of a beating! English football and British decline, c.1950–80. In Porter, D. (Eds.) Sport and National Identity in the Post-war World. London: Routledge, 31–51.
Power, M. (1999). *The audit society: Rituals of verification.* Oxford: Oxford University Press.
Purslow, C. (2013). *Digital is driving new business models and new ways to engage sports fans.* SportProMedia.

R3. (2015). Level Playing Field: SMEs, taxpayers, and the 'Football Creditors Rule'. Available at: https://www.r3.org.uk/media/documents/policy/policy_papers/corporate_insolvency/R3_Football_finance_briefing_(2014).pdf

Richards, D. (2008). *New Labour and the civil service: Reconstituting the Westminster model*. Palgrave Macmillan.

Richards, D., Smith, M., & Hay, C. (2014). *Institutional crisis in 21st century Britain*. Palgrave Macmillan.

Russell, D. (1997). *Football and the English: A social history of association football in England, 1863–1995*. Carnegie Publishing.

Scraton, P. (2009). *Hillsborough: The truth*. Random House.

Sharma, R. S. (2011). *Understanding the interactive digital media marketplace: Frameworks, platforms, communities and issues*. IGI Global.

Sports Ground Safety Authority (2015). Annual Report. HC 124. London: HMSO

Supporters Direct Europe. (2012). *The heart of the game: Why supporters are vital to improving governance in football*. London: Supporters Direct.

Szymanski, S. (2006). A theory of the evolution of modern sport. *Journal of Sport History, 35*(1), 1–32.

Taylor, I. (1971a). Soccer consciousness and soccer hooliganism. In S. Cohen (Ed.), Images of deviance (pp. 134–164). Harmondsworth, UK: Penguin.

Taylor, I. (1991). English football in the 1990s: Taking Hillsborough seriously? In J. Williams & S. Wagg (Eds.), British football and social change: Getting into Europe (pp. 1–15). Leicester, UK: Leicester University Press.

Taylor, M. (2007). Politics and the people's game: Football and political culture in twentieth century Britain. Retrieved from http://www.idrottsforum.org/articles/taylor/taylor070117.html

Taylor, M. (2013). *The association game: A history of British football*. Routledge.

Times, S. (1985). Editorial. *S. Times*, May 19.

Urry, J. (1994). Cultural change and contemporary tourism. *Leisure Studies, 13*(4), 233–238.

Wagg, S. (2004). *British football & social exclusion*. Routledge.

Walvin, J. (1975). *The people's game: A social history of British football*. Allen Lane.

Watson, M., & Hay, C. (2003). The discourse of globalisation and the logic of no alternative: Rendering the contingent necessary in the political economy of New Labour. *Policy & Politics, 31*(3), 289–305.

Whannel, G. (1979). Football, crowd behaviour and the press. *Media, Culture & Society, 1*(4), 327–342.

Whannel, G. (1992). *Fields in vision: Television sport and cultural transformation*. Psychology Press.

Williams, J. (2001). The fall of Liverpool FC and the English football 'revolution'. In Williams, J., Long, C. and Hopkins, S. (Eds.) *Passing rhythms: Liverpool FC and the transformation of football. Oxford: Berg* (pp. 147–171).

Williams, J. (2011). *Red men: Liverpool Football Club—The biography*. Edinburgh: Mainstream Publishing.

CHAPTER 7

Post-2008: An Era of Regulatory Crisis?

Introduction

Tradition and crisis form the two central themes of this book. They have both been invoked to explain the nature of the contemporary British regulatory state. However, it is logical to talk about a *dominant* regulatory tradition in crisis? The evolution of the prevailing political and regulatory traditions has not been linear. We have investigated the dynamics between the growing pressures for change that have arisen over the last 30 years and the enduring influence of dominant traditions. There has been a recurring tension at the core of the UK regulation between the enduring values of the club world—informality, secrecy, flexibility—and the reforming zeal of the state in late modernity.

In using the lens of tradition, the role played by ideas in the evolution of regulation is brought into sharper focus. In the preceding pages, I criticised the lack of attention given to ideas in explaining rather than just describing UK regulation, which has led to an underdeveloped and theoretically thin conception of its practice and development. In response, I problematised the dominant approach to regulation in the UK: what I call the British regulatory tradition. This offers a more conceptually rich account of the narratives of regulation and crisis, which is grounded in a critical conception of the dominant ideas of British politics.

At its core, the British political tradition is based on a limited liberal conception of representation and a conservative notion of responsibil-

D. Fitzpatrick, *The Politics of Regulation in the UK*,
DOI 10.1057/978-1-137-46199-5_7

ity. Taken together these two principles maintain that elected politicians, aided by a permanent, politically neutral and anonymous civil service, are best placed to make decisions as guardians of the public interest; even when this is set against the expressed will of the majority or in the face fundamental opposition.

The British political tradition can be summarised thusly: 'Westminster and Whitehall know best.'

Faith in the ability of the political elite to govern competently and benignly came to be accepted as common sense by a largely deferential public, as well as external observers of the British polity and the political class itself. The effect of this dominant political culture shaped the development and practices of political institutions and understandings of change. In an institutional context, the central tenets of the BPT have helped produce a highly centralised political system that privileges a strong and decisive form of government, justified and protected by the constitutional principles and conventions of single-party majority government, parliamentary sovereignty, the unitary state and unionism. The faith invested in the sagacity and benevolence of elites in the BPT also leads to a discourse on change that emphasises the virtues of continuity, gradualism and flexibility (Hall 2011). In cultivating and maintaining this Whig understanding of developmentalism, Britain is seen to stand apart from other advanced liberal democracies. This political and cultural exceptionalism of the British polity has long been considered to be a superior approach offering distinct advantages over other state traditions.

The influence of the discourse on British exceptionalism and the superiority of this elitist conception of democracy on the origins and development of state regulation in the UK have been the key concerns for this book. The apparent failures of the British model of regulation map onto a wider debate about 'the weakening of the foundational assumptions that Britain was exceptional, and perhaps even an exemplary nation-state, with a unique institutional architecture and political culture' (Kenny 2014: 35). In seeking to understand the relationship between crisis and the British regulatory tradition, Moran (2003: 174, my emphasis) offers a useful typology for understanding the nature and origin of different crises:

- crises as *residues* of the old club world, as either the policy legacy of the incompetent club world or the result of persistence of the old club attitudes despite institutional reform;

- crises resulting from the *hyper-politicisation* of issues previously ensconced in the closed policy communities of the club world;
- crises resulting from the *overextension* of the regulatory state in its drive to create the mechanisms of synoptic central control and surveillance.

While useful as an analytical scheme for differentiating between different policy disasters, blunders, fiascos and scandals, these three features of crises are interrelated rather than mutually exclusive. The residual effect of the British political and regulatory traditions is in part a driver of the increasing politicisation of domains (such as finance and sport) that hitherto had operated as elite-dominated enterprises with little to no scrutiny from their publics or the state. This heightened politicisation has in part driven the imperative to extend the regulatory and surveillance capacities of the state through regulation.

The pressures on the British regulatory state therefore are internal as well external. The desire to create more efficient public utility enterprises led actors in the conservative government of the 1980s to pursue a neoliberal vision of regulation as a non-discretionary, economic science. The goal of this neoliberal tradition was to impose an ordered rationality on the British tradition of regulation. It is in this context of rationalisation that Moran (2003) talks about this 'new' regulatory state as the pursuit of 'high modernism'. Modernity, premised on the Enlightenment principles of rationality and foundationalism, is antithetical to tradition. In reality, however, political reform rarely begins with a 'clean slate'; it evolves through incremental change that takes place within, and is conditioned and constrained by, the structured institutional and ideational context that it is reforming or even dissolving (Streeck and Thelen 2005). We are reminded here of Hay's aphorism that to speak of change is also to accept the existence of continuity. As Shils (2006: 325) argues, even the revolutionary ideas of the Enlightenment were premised on 'the soil of substantive traditionality'. Similarly, the neoliberalism of privatisation built upon rather than replaced the British regulatory tradition that had existed hitherto.

While pressures for change have inevitably led to the adaption of British regulatory state, the evolutionary process has been mediated through an ideational construct that has privileged particular aspects. Thus, although the forces of globalisation, neoliberalism and a bottom-up participatory tradition have played a role in the contemporary regulatory space, the various ideas that underpin these have resonated asymmetrically. Put simply,

regulatory ideologies congruous with the key concepts of representation and responsibility in the BPT have tended to be more successful than ones that draw on alternative, participatory notions of regulatory democracy. As such, regulatory regimes in the UK tend to have a 'recursive quality' (Braithwaite and Drahos 2000: 48).

The Global Financial Crisis: A Critical Moment not Juncture

The global financial crisis, which was marked in Britain by the first run on a bank (Northern Rock) for 140 years in September 2007, continues to cast a long shadow over British politics. The global financial crisis, which has been followed by sovereign debt crises in the Eurozone and huge retrenchment of public spending in many countries including the UK, has been the subject of much public and political discussion in the intervening years. The causes, management and consequences of the financial crisis have all been hotly debated and contested. One of the key themes to emerge is the absence of real change in the political economy of many of the liberal market economies affected (Grant and Wilson 2012). This is seen to be counter-intuitive given the systemic flaws in the existing system of banking and financial regulation revealed by financial crisis.

The crisis created a confluence of the problem and politics streams, deemed necessary for major policy change (Kingdon 2003); there was universal recognition that there was a *problem* (toxic debt, complexity in the shadow banking market, excessive risk taking, lax regulatory regime, overdependence on financial services for economic growth) together with favourable *political* circumstances for change (the actual, and potential further, collapse of major financial institutions threatened not only the viability of the global financial system but also the security of entire populations). However, while many ideas reform floated around the 'policy primeval soup' no paradigm-defining ideas emerged with sufficient level of articulation by a set of determined policy entrepreneurs with the ability, resources and political will to drive such a reform agenda.

This is not to suggest that the events of 2008 did not result in any change. Far from it. The immediate aftermath of crisis mitigation produced significant changes in the broadly neoliberal policies and discourse of the previous 30 years. The government's first response to the unfolding financial crisis was to establish arrangements for depositor protection

in an effort to enhance financial stability while also maintaining the 'UK's reputation as the pre-eminent location for financial services' (HM Treasury, FSA and Bank of England 2007: 8). As the crisis escalated, however, the government was forced to enact more drastic measures, nationalising Northern Rock and Bradford and Bingley, publicly funding capital investments in Lloyds TSB and the Royal Bank of Scotland, and establishing the United Kingdom Financial Investments (UKFI), as an arms-length regulatory body to oversee these investments. The Treasury had previously avoided these policy options fearing that direct intervention in the banking system would irreparably damage the City's international reputation and credibility (Gamble 2009). But the gradual realisation that collapse of the entire financial system was not only possible, but probable, if action was not immediately taken resulted in a change in attitude. The resulting measures to underwrite the damage of the crisis amounted to 'the largest UK government intervention in financial markets since the outbreak of the First World War' (Bank of England 2008).

The scale of this intervention challenged the conventional wisdom that the role of the state in the liberal, market-coordinated Anglo-Saxon political economies (namely the USA and UK) had been irrevocably reduced to minimal bit-part player, limited to enabling market friendly conditions (Soskice and Hall 2001). Once relegated to the position of a back seat driver in the global financial economy (The Economist 1995), the state was now not only in the driver's seat but also had bought a significant proportion of the of the cars on the road (albeit the ones with some serious design flaws). As Grant and Wilson (2012: 6) observe: 'the plausible explanations of the GFC as a consequence of the neoliberal approach to policy seemed to discredit that approach at least as thoroughly as the stagflation of the 1970s had apparently discredited Keynesianism'. The initial signs appeared to suggest that major reform was imminent. The interventions of the UK government to bail out the banks were indeed extraordinary: eye-popping sums of public money were used to recapitalise and even nationalise some banks, inject money into the economy under the policy of quantitative easing (QE), and keep interest rates at a record low of zero. In spite of these major interventions, significant change in the established political economy of Britain, including its regulatory approach, has (so far) failed to materialise.

The belief in the 'efficient markets' doctrine had been consolidated within mainstream British politics in the decade before 2008. New Labour, under Blair and Brown, had sought to reconcile the financial

growth model it had inherited from the Conservatives with increased spending on public services. In what Larry Elliot, economics editor of The Guardian, described as New Labour's 'Faustian Pact' (Shaw 2012), there was a conscious attempt to reduce the regulatory 'burden' on The City in order to consolidate and augment its position as the major global financial centre vis-à-vis Wall Street. The wealth created by a dynamic financial sector, through credit and asset booms, employment growth and increased tax revenues, was crucial to New Labour's policies on poverty alleviation (such as Working Tax Credits and Sure Start) and the modernisation of public services.

Measured against a narrow set of criteria, this finance-driven growth strategy was a success story. Between 1997 and 2007 output of the financial sector expanded at a rapid pace; twice as fast as the rest of the UK economy (Bank of England 2014). In this ten-year period, which has been referred to as the second wave of 'financial deepening' (Shaw 1973), The City's share of the UK economy increased from 6.6 per cent in to 8.5 per cent (HC 836: 7). Prior to the 'Big Bang' in 1986, the trading volumes of the City of London were a thirteenth of New York's and a fifth of the size of Tokyo; by 2006 it accounted for two-thirds of the global market in international bonds and was the key trading hub for the £400 trillion derivatives market (Skinner 2011; Hutton 2010).

The Big Bang of the 1986, which deregulated the City of London and broke up the elitist old boy networks that had hitherto dominated the investment banks, was 'the single most emblematic change in the system of self-regulation' (Moran 2003: 160). However, the deregulation of the 1980s was hardly the 'death blow' to the club system declared by Moran (2003: 161). The deregulation, or more accurately re-regulation of the City, was to preserve much of the self-regulatory mode of the financial club world. If nothing else, the financial crisis of 2008 tells us that the new regulatory systems that were constructed after 1986 were decisively shaped according to the self-regulatory instincts of the club system. The Big Bang may have replaced the floor of the Stock Exchange, as physical manifestation of the club world with its origins in the Royal Exchange and coffee houses of the seventeenth century, with an electronic automated system using programme trading. It also abolished the rule of single capacity, which ended the somewhat caricatured demarcation between the 'gentlemen brokers' and 'cockney barrow-boy jobbers' (Attard 1994; Judge 2014). Despite these changes, which undoubtedly had massive

implications for the structure of the financial markets, the predominant regulatory ideology prevailed largely intact.

In spite of the financial crisis, the British government remains wedded to a finance-led model of growth. Recovery was deemed to be largely dependent upon the widespread availability of bank credit in order to fuel private sector economic activity. The imposition of anything beyond facilitative regulation, therefore, is seen to place intolerable burdens on this recovery. In addition to its central role in growing other sectors of the economy the financial sector itself also remains significant in terms of its contribution to employment levels and tax revenues. Macartney (2011: 197) notes that in the year before the crisis hit, the financial sector employed 1.3 million people and contributed 11 % of income tax and 15 % of corporation tax. By 2012, it accounted for 12.6 % of GDP (The City UK 2014: 14).

Complementing these instrumental rationales was the firmly embedded individualist culture running through the political and financial sector elites. Since deregulation in 1986, political and financial elites have perpetuated a light-touch regulatory culture in this sector, perhaps best evidenced by Labour's permissive tripartite regime established in 1997. This culture has survived in the post-2008 era. One month after coming to power the new Chancellor, George Osborne, asked Sir John Vickers (Chief Economist at the Bank of England during Labour's first term) to chair an Independent Commission on Banking (ICB). From the outset, however, the scope of the report was limited to the prevention of future financial crisis; in other words, its focus was on the protection of capital in the established model of economic growth rather than dealing with the more fundamental issue of how the banking sector 'can be reformed to support growth in the real economy' (TUC 2012: 2). The Report recommended the separation (or ring-fencing) of retail and investment activities and the establishment of a new regulator (the Financial Conduct Authority) to promote competition. Coming in the wake of the biggest financial crisis since the Wall Street Crash, this constituted modest re-regulation of the banking sector. It was ultimately focused on securing rather than reforming the Anglo-Liberal growth model, in which banks were not so much 'too big' as 'too important to fail' (King 2009: 3). Regarding the subsequent White Paper, Vickers accused the government of 'watering down' (Treanor 2012) his proposals for regulatory reform; the Chair of the now abolished FSA, Lord Turner, criticised it being too focused on market competitiveness (Moore 2012). As Froud et al. (2010: 32) observe: 'What

makes the White Paper especially significant is that its approach to the regulatory system is not idiosyncratic; it reflects a consensus about the design of the regulatory system, and the meaning of the banking rescue, that has come to unite both regulatory and banking elites.'

The financial crisis in 2008, therefore, was a critical *moment* but not a critical *juncture*. A critical moment represents an opportunity, real or perceived, for significant institutional or cultural change to the status quo. As Bulmer and Burch (2009: 29) define, a critical moment is an event that 'raises a general expectation that significant change will follow'. That is not to say that expectation will be shared by all groups and individuals. The attitudes and interpretation of events by elites, the media and public opinion may coalesce or diverge; indeed, there may well be a lack of agreement whether a situation warrants the description of a critical moment at all. This discrepancy goes someway to explain why not all critical moments for change—what Kingdon (2003) calls 'windows of opportunity'—are realised. The exploitation of these opportunities results in 'critical junctures' (Collier and Collier 1991): branching points in the path of political life that lead to new trajectories of development. Although not necessarily constituting total discontinuity, these critical junctures signify a clear departure from established patterns (Bulmer and Burch 2009).

Why was the critical moment of 2008 not fully realised as a critical juncture for the UK's political economy? A number of scholars have wrestled with this particular puzzle. For Morgan, powerful actors with vested interests in maintaining the status quo have been successful, despite the whole-scale delegitimisation as a result of the crisis, in minimising the extension of legal and regulatory constrain over their activities (Morgan 2010). This has enabled many parts of the financial sector to continue trading in 'over-the-counter' derivatives products, such as credit default swaps and collateralised debt obligations, which has been identified as the fundamental cause of the sub-prime crisis in the US housing market that instigated the wider financial crash in 2008. These actors have been able to reconstruct the financial crisis and relegitimatise their practices because opponents of the existing regime lack a viable alternative to the financialised economy. The strategic narration of the financial crisis by these interests has proved crucial in this relegitimisation.

The Global Financial Crisis: A Tsunami With No Fault Lines

In the immediate aftermath of the financial crisis, one word was repeated time and again to describe the pace and magnitude of the events unfolding: *tsunami*. The invocation of what Alan Greenspan called a 'once in a lifetime credit tsunami' was designed to propagate the notion that the financial crisis was somehow a natural rather than man-made disaster. Tapping into this fatalist narrative, the image of the financial crisis as a 'black swan' (Taleb 2007) event was created: unforeseeable and beyond the scope of human agency. The metaphorical use of the word tsunami was a deliberate attempt to suggest that the normal functioning of the market had been disturbed by highly irregular movements; just as the equilibrium of the ocean is upset by the seismic activity of the sea floor. In an analogous fashion, the claim was that global financial crisis was caused not by the contradictions of the market system per se but by perturbations at its base: the sub-prime mortgage lenders and borrowers, culpable of egregious consumer spending. This narrative effectively individualised the crisis, neutralising the systematic failures—*the fault lines*—that precipitated it.

The regulatory response to the financial crisis in the UK highlighted the moral and political ambivalence of the British regulatory tradition. The response to the fallout of the financial crisis was lacking in any meaningful discussion of the values and morals that would underpin the newly reformed regulatory regime for banking and finance. References to 'crony capitalism', 'predators versus producers' and 'responsible capitalism' have been made periodically post-crisis, without any real elucidation to their meaning or significance. This rhetoric has failed to frame the dominant discourse and has certainly not resulted in meaningful regulatory reform. Indeed, it pales in insignificance compared to the predominant austerity narrative and the ancillary neo-Victorian moral discourse of 'strivers versus skivers'. For Tombs (2015), the brief forays in 'banker bashing' were little more than rhetorical devices—what he calls 'morality plays'—designed to appease the collective sense of anger amongst the public about the crisis and subsequent bail-out. The public questioning of senior bankers in select committee hearings and civil court appearances amounted to little more than show trials; orchestrated as 'quasi-degradation ceremonies' (Tombs 2015: 55), in which there was much hand-wringing but very little accountability, either accepted or apportioned. By shining the spotlight

on individual villains—such as Fred 'The Shred' Goodwin—the focus was shifted away from the systemic failings of the whole sector.

These 'morality plays' were a brief stage in a broader legitimation strategy to minimise the collateral damage of the crisis to the adopted financial growth model, which relies upon a conciliatory regulatory environment. By 2010 there was increasing calls for an end to the 'banker bashing season' (O'Grady 2011) from within the sector itself and from senior politicians. Bob Diamond, the American chief executive of Barclays, told a Treasury select committee in January 2011 that the time for 'remorse and apology' from bankers should be over. Approximately 18 months later, however, he was back in front of the same committee again answering questions about Barclay's role in the Libor fixing scandal; this time he offered an apology, though not personal culpability, claiming he did want to leave any doubt about 'how sorry I am, how angry we are or how disappointed we are' (HC 481 2012, Q155).

Just over a year after he celebrated the 'golden age for the City of London'. Gordon Brown (2008) claimed: 'Bankers had lost sight of basic British values, acting responsibly and acting fairly … And so this is our choice—to toughen the rules on those who break the rules … markets need morals.' This proved to be a popular line with a public whose confidence in the banking system had fallen from 90 % in 1983 (higher than any other institution) to just 19 % in 2009 (Curtice and Park 2010). Brown's appeal to market morality proved no more than a rhetorical flourish, however.

On the surface, this rhetoric implied a decisive break with the light-touch narrative which Labour had espoused in the previous decade. Yet closer analysis reveals that the 'deep politics' (Dale Scott 1996) of the British regulatory tradition was still informing practice. This is neatly illustrated by two key moments in the trajectory of post-crisis financial reform. First, the role of chairing the new regulatory body UKFI was given to Sir Philip Hampton, principal architect of the individualist regulatory strategy, which had permeated governmental circles since the post-2004 reformulation of the better regulation agenda. Rather than searching for new figureheads with new ideas, the government was turning to familiar faces for more of the same. Second, instead of significantly redrawing the regulatory arrangements between the Treasury, FSA and Bank of England as many were calling for, the Treasury White Paper Reforming Financial Markets (2009) sought only to effect relatively minor changes to what remains an essentially light-touch regulatory regime (see Froud et al. 2010). The White Paper therefore signalled a largely 'business as usual'

approach to financial regulation or a 'timid rebranding' as one observer put it (McDonnell 2009); though it should be mentioned that the actors populating these regulatory institutions were not necessarily left quite so unchanged, as evidenced by some of the strong reformist positions taken by the regulators themselves: Mervyn King, Governor of the Bank of England, argued that the regulation of banking had been allowed to become too much of a special case and reform was 'essential', in line with 'other industries [where] we separate those functions that are utility in nature—and are regulated—from those that can safely be left to the discipline of the market' (2009). For Andrew Haldane (2010: 2), the executive director for financial stability, the systematic risk to the wider economy and general public created by the banking industry is a negative externality that should be subject to regulation and even prohibition, in the same way as other types of 'pollutant[s]'.

The critical point is not whether markets need moral limits or not. Most people accept that there are areas of life that should not be marketised; though there is fierce contestation about where to draw the line (Sandel 2012). The state will intervene to impose boundaries where there is a consensus that the operation of markets is illegitimate; for example, although surrogacy is permitted in the UK, commercial surrogacy (where the biological mother is paid, beyond reasonable expenses) is prohibited. This type of regulation by outright prohibition we would normally classify as repression, where the activity, or at least payment for that activity, is not permissible. In the British context, however, the state does not consider itself to be the legitimate regulator of the morality of existing markets, or where new markets are created in what were formerly publicly provided goods and services.

To suggest that regulation should have moral agenda would inevitably question the political power of private capital (Gill and Law 1989). As discussed in Chap. 3, it is not that UK regulation has no normative or moral agenda, but rather that the values and principles underpinning it are naturalised to the point where they are considered as a common sense rather than prescriptive and value-laden. One of the key contradictions at the heart of the neoliberal tradition of regulation is the question of rationality. The dominant narrative is that market forces, not moral imperatives, are the most efficient allocator of resources. This is premised on a methodological individualism: the assumption that human behaviour can be reduced to rational self-maximising choices of *homo economicus* or economic man. However, the narratives of light-touch, responsive smart and risk regulation—which I argue all have their antecedents in the British

regulatory tradition—are built on the premise that most private economic actors are not 'amoral calculators'. In this perspective, the regulatory role of the state is only permitted to address a small minority of persistent, recalcitrant offenders. In this view, business and finance are motivated by moral sentiments as well as rational, calculative profit accumulation. How these two antagonistic drivers of action are reconciled or balanced, either theoretically or empirically, is never explained with any degree of clarity.

Pathology Without Crisis

As the dust settled on the post-crisis landscape, it became apparent that the neoliberal narrative was reasserting its position of dominance in British politics, shaping the understanding of what was deemed common sense in the settlement between the state and private capital. An important implication of this trend is that the more this neoliberal narrative takes hold, the more the aftermath of the financial crisis can be seen as giving rise to a crisis—in terms of delegitimation—of state regulation. Tombs (2015) characterises this as the 'statilisation' of the financial crisis. The socialisation of debt and the austerity cuts to government spending concentrated the fiscal costs of the crisis on the welfare state and public sector. This was justified according to a typical appeal to the conservative notion of responsibility: 'government with the courage to take the hard decisions necessary to deal with the deficit' (Wren-Lewis 2015).

Post-2010, however, there has been a notable gap between rhetoric and reality in the field of regulatory reform. The anti-regulatory discourse of the Conservatives, after the crisis, has been broad in scope. A key part of their agenda—and a 2010 manifesto pledge—was to substantially reduce the burden of the 'increasing amounts of red tape and complex regulation [which] have eroded Britain's reputation as a good place to invest, create jobs or start a business' (Conservatives 2010: 20). Another part of their programme was focused on 'curtailing the quango state' (Conservatives 2010: 70). Despite the hyperbole, the Conservative-led coalition government did not redraw the boundaries of the regulatory state. Progress on cutting the 'red tape' of regulation and building a 'bonfire of quangos' has to date been rather piecemeal (Fitzpatrick and White 2014; Dommett and Flinders 2015). The Red Tape Challenge has, if anything, served to highlight the ongoing relevance of many regulations on the statute books, and the bonfire of quangos has shown not only that the nebulous structure of state regulation is particularly difficult to reshape but also that many state officials do not necessarily want it reshaped anyway. So although the

regulatory state continues to be a convenient rhetorical target, at a granular level the institutions and practices of state regulation remain deeply embedded in the British state. There is, it seems, a dissonance between the rhetorical assault on the legitimacy of the regulatory state and the continuing embeddedness of its institutional expression.

In some respects, the purpose and goals of state regulation have been reanimated. Each new scandal and crisis the government encounters holds within it the potential to breathe new life into another part of the regulatory landscape that they have previously sought to delegitimise with the assumptions and arguments of the neoliberal tradition. Recent scandals surrounding the treatment of patients in the Mid Staffordshire NHS Foundation Trust, the discovery of horsemeat in supermarket beef products, and the phone hacking by newspaper journalists have all brought with them calls for stronger regulation. In many ways, the events and experiences in the aftermath of the financial crisis pour metaphorical water on the rhetorical claims to 'roll back the tide of regulation'.

The successive rounds of re-regulation, in reaction to crises and fiascos, have increased the formal and centralised nature of UK regulation. Regulation is a process that is increasingly driven from the centre. Local enforcement officers have less discretion (not to mention resources) than they once enjoyed. The regulatory state is expanding (at the centre) and contracting (at the local level) at the same time. The economics of austerity can be seen as the driver of these opposing trends. The centrifugal nature of these regulatory dynamics means that the relationship between the dominant political and regulatory traditions is now more cohesive. The centre has chosen the aspects of the British model—namely a compliance approach based on business-friendly advice and education—that it wants to codify in official guidance and statute. Therefore, while much of the British regulatory tradition remains intact, it is the centre that now decides what regulation is in the public interests. This can be seen in the shift away from the terminology of national enforcement priorities, towards priority regulatory outcomes; primarily to support business into compliance in a way that meets their needs. In 2007, the Treasury set up the Local Better Regulation Office (LBRO) (Rogers, 2007)

> to ensure that local authority regulatory services, including trading standards, environmental health and licensing are included within the scope of the Hampton Code of Practice. Like national regulators they will need to have regard to the Code when setting their enforcement policies.

Tombs argues that these reforms amount to the institutionalisation of a new form of regulation: 'regulation without enforcement' (2015: 132). However, whether this change to more centralised regulatory regime represents a new trajectory for UK regulation is moot. While the quantitative data offered by Tombs indicates a downward trend in the enforcement—for example, 52 % of fewer inspections of pollution control between 1999 and 2009 and 54 % of fewer successful prosecutions of pollution incidents between 2003 and 2012—the qualitative evidence from interviews with local environmental health officers suggests a more complex situation. The respondents offer diverging interpretations of the current regulatory climate, ranging from supportive to actively resistant. In terms of the better regulation agenda, some interviewees observe that it merely codifies what local enforcement officers have always done: 'we've always risk-rated our premises … so operating on the basis of risk targeting is nothing new for local authorities'; 'I think we've been doing this before better regulation came in … We'd expect our officers to be following these principles without them being written down' (Tombs 2015: 160).

The cyclical nature of regulatory crises has enabled central political actors to strengthen the British regulatory tradition. In the wake of different fiascos, Labour and then the Coalition government were able to engage in a period of intense re-regulation that was designed not to shift to a new model of regulation but rather to embed the existing tradition of regulation in new institutions and legislation, such as the LBRO. The better regulation agenda has provided the crucial rhetorical vehicle for this re-regulation. Better regulation is understood only in the frame of reference provided by the existing British regulatory tradition. In words, *better* translates as regulation according to the dominant business-friendly, compliance model that stresses cooperation, education and persuasion over strict enforcement. The trajectory, therefore, is towards increasingly risk-based regimes of regulation that seek to privilege prevention and reduce inspection.

There is a fundamental contradiction at the heart of this model, however, which may come to unravel the British regulatory tradition in the near future. Effective risk-targeting (indeed all regulation) is dependent on high-quality information and intelligence gathering; the orthodox compliance model is based on a low relational distance between the regulator and the regulated. However, if pressure is exerted from the centre to minimise inspection, this will eventually impair the intelligence about the businesses and sectors upon which risk-ratings are based (Tombs 2015). This flaw at the heart of the better regulation agenda will almost certainly lead to future regulatory crises and fiascos. What we can be less sure of is the response of government to such events.

Bibliography

Attard, B. (1994). The jobbers of the London Stock Exchange: An oral history. *Oral History, 22*(1), 43–48.

Bank of England (2008) Financial Stability Report, Issue No. 24. London: Bank of England.

Bank of England. (2014). *Quarterly Bulletin 2014 Q1*.

Braithwaite, J. and Drahos, P. (2000) Global Business Regulation. Cambrdige: Cambridge University Press.

Brown, G. (2007). *Speech by the chancellor of the exchequer*. London: Mansion House. Retrieved from http://www.hm-treasury.gov.uk/press_68_07.htm.

Brown, G. (2008). Speech to the United Jewish Israel Appeal, 6 Oct 2008. London.

Bulmer, S., & Burch, M. (2009). *The Europeanisation of Whitehall: UK central government and the European Union*. Oxford University Press.

Collier, R. B., & Collier, D. (1991). Shaping the Political Arena: Princeton: Princeton University Press.

Conservatives. (2010). *The Conservative Manifesto 2010: An invitation to join the government of Britain*.

Curtice, J., & Park, A. (2010). The Conservative Party. A tale of two crises: Banks, MPs' expenses and public opinion. *British Social Attitudes Survey, 2011*, 131–154.

Dale Scott, P. (1993) Deep Politics and the Death of JFK. Berkeley: University of California Press.

Dommett, K., & Flinders, M. (2015). The politics of quangocide. *Policy & Politics, 43*(1), 3–25.

Fitzpatrick, D., & White, A. (2014). A crisis of regulation. In *Institutional crisis in 21st-century Britain* (pp. 198–217). Basingstoke: Palgrave.

Froud, J., Moran, M., Nilsson, A., & Williams, K. (2010). Richards, D., Smith, M. and Hay, C. (Eds.) Wasting a crisis? Democracy and markets in Britain after 2007. *The Political Quarterly, 81*(1), 25–38.

Gamble, A. (2009). *The spectre at the feast: Capitalist crisis and the politics of recession*. Palgrave Macmillan.

Gill, S. R., & Law, D. (1989). Global hegemony and the structural power of capital. *International Studies Quarterly, 33*(4), 475–499.

Grant, W., & Wilson, G. K. (2012). *The consequences of the global financial crisis: The rhetoric of reform and regulation*. Oxford University Press.

Haldane, A. (2010). The debt hangover. Speech by the Executive Director Financial Stability, *Bank of England*, 27.

Hall, M. (2011). *Political traditions and UK politics*. Palgrave Macmillan.

Hutton, W. (2010). *Them and us: Changing Britain—Why we need a fair society*. London: Little, Brown.

Judge, B. (2014). 27 October 1986: The City's Big Bang. *MoneyWeek*.

Kenny, M. (2014). *The politics of English nationhood*. Oxford University Press.

King, M. (2009). Speech given by Mervyn King, Governor of the Bank of England to Scottish Business Organisations in Edinburgh. October 20, 2009.

Kingdon, J. (2003). Agendas, alternatives, and public policies. London: Longman.
Macartney, H. (2011). Crisis for the state or crisis of the state? *The Political Quarterly, 82*(2), 193–203.
McDonnell, J. (2009). LEAP economics: Darling kowtows to finance sector . . . bank on it. Available at: leapeconomics.blogspot.com/2009/07/darling-kow-tows-to-finance-sector-bank.html
Moore, J. (2012). Turner's candour may shut bank door. *Independent*, July 25.
Moran, M. (2003). *The British Regulatory State: High modernism and hyper-innovation: High modernism and hyper-innovation*. Oxford University Press.
Morgan, G. (2010). Legitimacy in financial markets: Credit default swaps in the current crisis. *Socio-Economic Review, 8*(1), 17–45.
O'Grady, S. (2011). Why is all our fury directed at Bob Diamond and the 'fat cat' bankers?. *The Independent*, January 13.
Rogers, P. (2007). National enforcement priorities for local authority regulatory services. Cabinet Office: HMSO.
Shaw, E. S. (1973). *Financial deepening in economic development*. New York: Oxford University Press.
Shils, E. (2006). *Tradition*. University of Chicago Press.
Skinner, C. (2011). How the city developed, Part Thirteen: The Big Bang. Retrieved from http://thefinanser.com/2011/12/how-the-city-developed-part-thirteen-the-big-bang.html/
Soskice, D., & Hall, P. (2001). *Varieties of capitalism. The institutional foundations of comparative*. Oxford: Oxford University Press.
Streeck, W., & Thelen, K. (2005). *Beyond continuity: Institutional change in advanced political economies*. Oxford University Press.
Taleb, N. N. (2007). *The black swan: The impact of the highly improbable*. Random House.
The City UK (2014). Key Facts about the UK as an International Financial Centre 2014. Available at: https://www.thecityuk.com/research/key-facts-about-the-uk-as-an-international-financial-centre-2014/
The Economist. (1995). A survey of the world economy: Who's in the driving seat?. *The Economist*.
Tombs, S. (2015). *Social protection after the crisis: Regulation without enforcement*. Policy Press.
Treanor, J. (2012). John Vicker's says Osborne Reforms don't go far enough. *The Guardian*, June 14.
Treasury Committee HC 481-II 4 July 2012 (2012–13).
Wren-Lewis, S. (2015). The economic consequences of George Osborne: covering up the austerity mistake, New Statesman, 22 April 2015. Available at: http://www.newstatesman.com/politics/economy/2015/04/economic-consequences-george-osborne-covering-austerity-mistake

Bibliography

581, H. (2012–2013). *The report of the Hillsborough Independent Panel*. London: HMSO.

All Party Parliamentary Group on Football (2009). *English Football and its governance*. London: Thales.

Black, J. (2001). "Managing Discretion." ARLC Conference Papers. Penalties: Policy, Principles and Practice in Government Regulation. Available at: http://w.lse.ac.uk/collections/law/staff%20publications%20full%20text/black/alrc%20managing%20discretion.pdf

Blair, T. (2005). Speech to the Institute for Public Policy Research. May 26 2005. London: IPPR.

DCMS, Culture Media and Sport Select Committee. (2011). *Football governance*. London: HMSO.

Department of Trade and Industry (DTI) (1998). *A fair deal for consumers modernising the framework for utility regulation*.

HL Deb (2002) Football Clubs, 3 July 2002 (2001–2002) 637.

HM Chief Alkali Inspector (1974). Annual Report on Alkali etc. Works Regulations. HMSO: London.

HM Treasury, Financial Services Authority, Bank of England. (2007). *Banking reform—Protecting depositors: A discussion paper*. London: HMSO.

House of Lords Select Committee on Regulators (2007). *UK economic regulators*. London: TSO (HL 189).

Kay, J. A. (1985). "Who benefits from privatisation?". *The City-Association lecture*. City of London Polytechnic. Certified Accountants Educational Trust.

D. Fitzpatrick, *The Politics of Regulation in the UK*,
DOI 10.1057/978-1-137-46199-5

Labour Party. (1950). *Let us win through together: A declaration of labour policy for the consideration of the nation*. London: Labour Party.

Olsen, J. P. (2001). Garbage cans, new institutionalism, and the study of politics. The American Political Science Review, 95(1), 191–198.

Oakeshott, M. (1962). *Rationalism in politics and other essays*. London: Methuen.

Premier League (2015). *Premier League attendances continuing to thrive this season*. Retrieved September 17, 2015, from http://www.premierleague.com/en-gb/news/news/2014-15/oct/attendances-thriving-this-season.html

Sports Ground Safety Authrotiy (SGSA) (2015a). *Annual report and accounts 2014/2015*. London HMSO.

Stern, J. (2003). What the Littlechild Report Actually Said, In Bartle, I. (Ed.) The UK Model of Utility Regulation, CRI Proceedings (7–30).

The Bottom Line (2015).

Trades Union Congress (TUC) (2012). Banking after Vickers. Available at: https://www.tuc.org.uk/economic-issues/banking-after-vickers

Treasury Committee (2012). Fixing Libor: some preliminary findings, HC 481–I, 2012–13. London: HMSO.

Veljanovski, C. (1987). Privatization in Britain—The institutional constitutional issues. *Marquette Law Review, 71*, 558.

Vickers, J. & Yarrow, G. K. (1988). *Privatization: An economic analysis*. The MIT Press.

Index

D. Fitzpatrick, *The Politics of Regulation in the UK*,
DOI 10.1057/978-1-137-46199-5