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Changing Regulatory Systems

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CHANGING REGULATORY SYSTEMS

Political science is by and large a conservative discipline; we are better at explaining why things stay the same than why they change. Studies of topics as diverse as voting behavior, political culture and political institutions have produced sophisticated descriptions and explanations of continuity sometimes (as with the study of party identification) resisting passionately arguments that major change has occurred.

The study of public policy is no exception to this generalization. Approaches abound that emphasize the likelihood that there will be continuity rather than change in public policy. Richard Rose noted the importance of inheritance before choice in public policy as budgetary and legal commitments made long ago explain most of what government does today.¹ The “path dependency” school in comparative policy suggests that policies in different countries will tend to move further and further apart once at some critical juncture differing choices are made.² This is partly due

¹ Richard Rose *Inheritance Before Choice in Public Policy* (Glasgow: Centre for Public Policy, University of Strathclyde, 1989.)

² Ruth Berins Collier and David Collier: *Shaping the Political Arena: Critical junctures, the Labor Movement and Regime Dynamics in Latin America* (Princeton: Princeton university press, 1991); James Mahoney “Uses of Path Dependency in Historical Sociology” *Theory and Society* 29 (2000) 507-48; Margaret Weir “Ideas and the Politics of Bounded Innovation” in Sven Steinmo, Katherine Thelen and Frank Longstreth (eds.) *Structuring Politics: Historical Institutionalism in Comparative Analysis* (New York: Cambridge University press, 1992) pp 188-211; Paul Pierson *Dismantling the Welfare State: Reagan, Thatcher and the Politics of Retrenchment* (Cambridge and New York: Cambridge University Press, 1994.) For a critical discussion of path dependency see Adam Sheingate *The Rise of the Agricultural Welfare State: Institutions and Interest Group Power in the United States, France and Japan* (Princeton NJ: Princeton University Press, 2001.) For an argument that Thatcher at least hacked back the British welfare state more than Pierson suggests, see Evelyne Huber and John D. Stephens

to the logic of the policy adopted itself. Modifications that are relatively easily made to one policy approach may be extremely difficult to graft onto another. Moreover, the positive political feedbacks that result from many policies (such as agricultural subsidies or welfare state benefits) provide a powerful impediment to reformers who wish to recast a policy fundamentally; as Pierson argues, Thatcher found it easier to criticize than to change the British welfare state. Those attracted to a network approach to understanding public policy would argue that a policy is unlikely to change because it is created and administered by networks of organizations that are locked into mutually beneficial relationships of assistance and cooperation. Esping-Anderson provided one of the most famous illustrations of policy resilience with his descriptions of the three worlds of welfare; contrasts between the social democratic, paternalistic and liberal welfare states endured even while changes were made in the details of their programs.³

Grace Skogstad and Elizabeth Moore provide a further explanation of policy stability as they develop the concept of “policy resilience.”⁴ As Goldstein argued, policy ideas can have an enduring power and influence. Economic doctrines such as classical economics in the 1930s, arguably Keynesianism in the 1970s and, Goldstein would argue, the US commitment to freer trade endured after the conditions that the doctrine addressed successfully had changed.⁵ Skogstad and Moore note that some policy ideas

Development and The Crisis of the Welfare State: Parties and Policies in Global Markets (Chicago: University of Chicago Press, 2001.)

³ Gosta Esping-Andersen *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990.)

⁴ Grace Skogstad and Elizabeth Moore “Policy Resilience and Path Dependence: Policy Networks, Programmatic Ideas and GMO Regulatory Policies” (unpublished paper.)

⁵ Judith Goldstein *Ideas, Interests and American Trade Policy* (Ithaca: Cornell university Press, 1992.)

are more resilient than others in terms of their ability to accommodate change without formally changing or abandoning their core concepts.

Studies of regulatory systems have also tended to emphasize the importance of long enduring factors that promote considerable stability in regulatory styles that can differ considerably from one country to another. The concept of regulatory style has several dimensions that are often not fully distinguished. The concept refers first to the way in which regulations are developed. Although interesting differences can be described (as by Ogus⁶) in the formalities of the process, the crucial differences here is in the degree to which regulations are developed at one of the spectrum relatively harmoniously through discussion, mutual accommodation and implicit or explicit bargaining on the one hand or through conflict and obdurate insistence through all available political and legal tactics on maintaining one's position on the other. The differences are almost perfectly illustrated in the contrast on the one hand between the British Health and Safety Commission (HSC) in which representatives of employers, unions and local government reached agreement on health and safety rules almost always unanimously in an atmosphere of good will and in contrast the bitter fights between labor, business and government that has accompanied the adoption of any major rule by the American Occupational Safety and Health Administration (OSHA.)⁷ Regulatory style also encompasses the mode by which regulations are enforced. As Lundqvist⁸ and Kelman⁹ have noted,

⁶ Anthony Ogus "Comparing Regulatory Systems" in Anthony Ogus (ed.) *Regulation, Economics and the Law* (London: Edward Elgar, 2001.)

⁷ See Graham K Wilson *The Politics of Safety and Health* (Oxford: Clarendon Press, 1985.)

⁸ Lennart Lundqvist *The Hare and the Tortoise: Clean Air Policies in the United States and Sweden* (Ann Arbor: University of Michigan Press, 1980.)

Swedish regulators, though operating in a heavily social democratic political environment, are much likely to enforce regulations in a flexible, non punitive manner than American regulators; employers are more likely to be treated as reasonable people who sometimes makes mistakes than as exploitative or unreasonable people with little care for the welfare of their workers. I noted a similar contrast between British and American regulators. British Health and Safety Executive (HSE) inspectors were likely to treat a breach of regulations by an employer initially as the result of error or ignorance. While any subsequent repeated breach of the same regulation would occasion punishment, the initial response would be to issue warnings and offer advice on how to comply in the future. British regulators tended towards stressing the educative aspect of their work. In contrast, American regulators were likely to emphasize the detection and punishment of breaches of regulations, including first time offences.¹⁰ As Bardach and Kagan described, American regulators tend to “go by the book” in terms of imposing regulations and fines showing little if any flexibility or common sense in case they are held accountable subsequently for failing to prevent a one in a million disaster occurring through stringent enforcement.¹¹

It will be apparent from examples already offered in this paper that most discussions of “national styles of regulation” tended to contrast the United States with other countries. As Sheila Jasanoff has written, “US risk management practices displayed a resistance to consensus building and closure that set them apart from approaches in leading European

⁹ Steven Kelman *Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy* (Cambridge MA: MIT Press, 1981.)

¹⁰ Wilson, *The Politics of Safety and Health*

¹¹ Eugene Bardach and Robert Kagan *Going By The Book: the Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982.)

nations.”¹²The USA was characterized by a highly adversarial style in the adoption of regulations and a highly legalistic style in their enforcement. Very few important regulations promulgated by agencies such as OSHA or the EPA were accepted by industries. Almost all were challenged determinedly not only in the consultative processes mandated by the Administrative Procedures Act (and often in the enabling legislation for the relevant agency) but in Congress and the courts as well. American regulators as noted above were likely to be aggressive and legalistic in their enforcement styles. We have fewer comparisons of regulatory styles between pairs or groups of countries not including the United States, an obviously unfortunate situation for theorizing. Much of the literature has therefore focused on explaining American exceptionalism seeking to explain why the US has such an adversarial, legalistic regulatory style. Several factors have been advanced as explanations.

First, it has been argued, American regulatory style reflects rough, tough American culture. Americans are combative, even aggressive and determined in asserting their rights and interests; Swedes and Britons are less so. This culturalist explanation was stressed by Kelman¹³ and also used by the younger Vogel. Vogel, however, supplied a more sophisticated and historically specific cultural explanation arguing that the culture of resistance to regulation among American business executives reflected the historically contingent fact that large scale business in the United States predated large scale government.¹⁴ As Chandler had described¹⁵, large scale

¹² Sheila Jasanoff American Exceptionalism and the Political Acknowledgement of Risk” in Edward Burger (ed.) *Risk* (Ann Arbor: University of Michigan Press, 1993.)p.392-3.

¹³ Kelman, *Regulating America, Regulating Sweden*

¹⁴ David Vogel “Why Businessmen Distrust Their State: The Political Consciousness of American Corporate Executives” *British Journal of Political Science* 8 (1978) 45-78:

corporations (notably railroads) had achieved a strong administrative capacity from coast to coast long before the federal government. In Europe and Japan, strong government predated strong business organization; in the United States, it was the other way round. Meanwhile, US citizens, and particularly US public interest groups, displayed a lack of confidence in all major organizations, government agencies as well as ‘big business’ that resulted in demands for the inflexible enforcement of tightly written regulations. Flexibility and reasonableness in enforcement were seen as signs of the agency having been “captured” by industry.

A second explanation for American exceptionalism lies in the importance of the courts and legal procedures. Law requires that drafting procedures be open and enforcement inflexible in order to be fair. Discretion, common sense and flexibility are hallmarks of regulatory systems in which administrative agencies are granted significant discretion and deference from the courts.

A third explanation advanced by Wilson¹⁶ is that the multiplicity of institutions in the United States makes it almost impossible to achieve the trust, cooperation and goodwill that comes from iterative games between regulators and regulated in other countries. The Environment Agency and the industries with which it deals in the UK know that they have to live with each other; neither courts nor Parliament are likely to intervene. As each party has something to offer the other (more flexible enforcement from the

David Vogel *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Ithaca: Cornell University Press, 1986): David Vogel “The Power of Business in America: A Reappraisal” *British Journal of Political Science* 13 (1983) 1943: David Vogel *Fluctuating Fortunes: The Political Power of Business in America* (New York: Basic Books, 1989.)

¹⁵ Alfred D. Chandler *The Visible Hand: The Managerial Revolution in American Business* (Cambridge MA: Belknap Press, 1977.)

Agency, more cooperation and compliance from industry), the two sides learn to live with each other. In contrast, in the United States, a party that loses in one institutional venue can always transfer the struggle to another. Thus an industry that fails to convince the EPA or OSHA of its case can try to win in, among other institutions, the Executive Office of the President (by involving OMB), Congress and the federal courts. Instead of regulators and regulated learning cooperation through iteration, they learn that defeat in one institutional setting can be followed by victory in another. An extension or elaboration of this argument would be that the comparative weakness of the state in the USA discourages cooperation with regulators. In countries such as the UK, everyone knows that in the end the regulatory agency will in the end get its way; neither courts nor legislators are likely to save industry from its fate. It is therefore rational for industry to seek to ameliorate any regulation, even ones they dislike quite intensely, in response for concessions made by the regulators in return for promises of cooperation or the supply of useful information.

Finally, as Jasanoff has stressed, the structure of the scientific community in the United States is unique. In brief, the competitive, pluralist character of US politics is also apparent in its scientific community. In most European nations, scientific knowledge on risk issues is concentrated and insulated from public debate. Experts from business and government meet together in private to deliberate on what the risks are, or are not. In contrast in the US, “public interest” science has provided alternative and competing sources of expertise to that provided by government. Scientific controversies

¹⁶ Wilson *The Politics of Occupational Safety and Health*

may be settled not between experts but as in the controversy of the use of Alar by appeals to public opinion.¹⁷

We should note that all of these explanations of regulatory style rely on factors that are slow to change. Culture, legal structures and institutions in general are slow to change. The value of the concept of culture as opposed to mere public opinion is that it is relatively stable and enduring. Legal doctrines and even more, legal processes are supposed to be stable so that individuals and companies can have some certainty about their legal position. Institutions are also by definition enduring. Indeed, as Moe has argued, the purpose of institutional design is often to lock policies into place by making change difficult, even impossible.¹⁸

Pressures for Change

While political scientists tend to stress continuity (perhaps, thereby providing a useful corrective to journalists who stress change), events in the “real world” did seem to illustrate powerful pressures for change. There were several obvious pressures for change evident in regulatory policy.

First, there were endogenous pressures for change in regulatory communities. As Kettl et al. argued¹⁹, there was a growing feeling among experts on regulation that established approaches had reached the limits of their potential to achieve results such as higher levels of environmental quality. In a well worn metaphor, the low hanging fruit were said to have been picked through traditional command and control regulations. There

¹⁷ Jasanoff, *op. cit.*

¹⁸ Terry Moe “The Politics of Bureaucratic Structure” in *Can the Government Govern?* ed. John E. Chubb and Paul E. Peterson (Washington DC: Brookings Institution, 1989.)

¹⁹ Donald F. Kettl *Environmental Governance: A Report on the Next Generation of Environmental Policy* (Washington DC: Brookings Institution, 2002.)

were several aspects to this argument. It was widely believed that command and control regulations were said to have reached the point of rapidly diminishing returns and rapidly increasing costs. Simply ratcheting up requirements on emissions from smokestacks or discharge pipes would result in very modest gains but at very high costs. In contrast, however, significant environmental improvements might be attained by firms that were encouraged or allowed to invest flexibly in improving their performance. For example, a firm that was spared costly changes in its emission control technology might use the money to achieve major environmental improvements by modernizing its delivery fleet buying trucks with modern, much cleaner diesel engines. There was also widespread agreement that the most obvious environmental problems (such as heavy smokestack emissions) had been solved. The remaining problems such as non point source pollution (run off from farms, streets et cetera) were much harder to address through conventional regulations that specified the technology to be used in tackling a problem and generally required extensive monitoring of outcomes. Finally, though less frequently mentioned in the literature, there was an awareness in the United States that a political stalemate had developed. As with trench warfare from 1914-18, little ground was gained or lost. Groups that favored tighter regulations were unable to overcome opposition to them; business groups favoring de-regulation were unable to overcome the opposition of public interest groups aided by strategic resources such as the complex procedures that must be followed to repeal as well as adopt a regulation. There was in consequence increased interest in learning to live with each other and in “win-win” approaches acceptable to both business and its critics.

Second, although their existence was vigorously denied by some academics, the range of factors that we know as globalization exerted a powerful influence on policy makers in almost every country.²⁰ In general, globalization refers to the greater ease with which goods, capital and products can move across borders. This was expected to lead to a reduction in the ability of national governments to impose unwelcome policies (including regulations) on business. Businesses confronted with a government that they regarded as inimical to their interests or by a set of policies (such as a costly welfare state or strict controls on labor market practices) that reduced their competitiveness would move to countries with more favorable regimes. The almost complete abolition of tariffs on industrial goods in the Uruguay Round and regional agreements such as the Single European Market of the EU and NAFTA made it easier than ever before to shift production to “pro business” locations. The abolition of capital controls by all advanced (and most less developed) nations facilitates shifting investment funds to similarly highly regarded locations. Policy makers were therefore confronted with a difficult dilemma. On the one hand, popular support for many of the regulations most costly to business (such as environmental regulations) continued; environmental interest groups and

²⁰ The literature on globalization is now so voluminous that there is little point attempting to cite it all. Some obvious sources are Robert Boyer and Daniel Drasche (eds.) *States Against Markets: The Limits of Global Capitalism* (London: Routledge, 1996); Peter Hall and David Soskice (eds.) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford and New York: Oxford University Press, 2001); Laura Weiss *The Myth of the Powerless State* (Ithaca: Cornell University Press, 1998); Thomas L. Friedman *The Lexus and the Olive Tree* (New York: Farrar, Straus, Giroux, 1999); William Greider *One World, Ready or Not; The Manic Logic of Global Capitalism* (New York: Simon and Schuster, 1998); Edward S. Cohen “Globalization and the Boundaries of the State: A Framework for Analyzing the Changing Practice of Sovereignty” *Governance* 14 (2001) 75-97

social movements became stronger over the last quarter of the twentieth century in most advanced countries. On the other hand, the opportunity costs in the form of lost investment, capital, employment and economic growth of adopting “anti-business” policies also increased. The quest was on for policies that squared the circle, combining the quest for higher performance in areas such as the environment with a “pro-business” stance that avoided the costs of antagonizing business in an era of globalization.

A second and related pressure for change has come from policy transfer²¹. Isolated (though important) examples of countries learning from each other have occurred throughout modern (and perhaps pre-modern) history.) Never before, however, have governments engaged so intensively in discussions with each other on how best to conduct such a wide range of policies. The British Cabinet Office, for example, has a unit devoted to discovering “what we can learn from others” in different policy areas. Political scientists such Rose,²² Marsh, Dolowitz and Stone²³ have attempted to codify different types and mechanisms of policy transfer. Policy transfers can range in specificity on a spectrum from copying a particular policy to merely being inspired to “do something about” a particular problem. Policy transfers can range in terms of how voluntarily they are completed from simply deciding that an approach works well to being obliged by an

²¹ David Dolowitz and David Marsh “Learning From Abroad: the Role of Policy Transfer in Contemporary Policy-Making” *Governance* 13 (2000) 5-24.:

²² Richard Rose *Lesson Drawing in Public Policy* (Chatham NJ: Chatham House, 1993); Dolowitz and Marsh, *op. cit.*: David D. Dolowitz “British Employment Policy in the 1980s: Learning From the American Experience” *Governance* 10 (1997); David Dolowitz and David Marsh “Who Learns What From Whom? A Review of the Policy Transfer Literature” *Political Studies* 44 (1996) 343-357; Diane Stone *Governance* 13, (2000.)

²³ See the Special Issue of *Governance* on policy transfer edited by Dolowitz and Marsh *Governance* 13 (2000) No.1.

international organization such as the EU or IMF to adopt a policy as the price of securing a loan or membership in the organization; countries wishing to join the EU, for example, are not allowed to use the death penalty. Whereas as political scientists, as we have seen, have argued that national styles of policy are enduring, governments have seemed more eager than ever to learn from and even copy each others' policies. In some cases, as Dolowitz has argued, important policy changes (as in British welfare policy in the 1990s) cannot be understood without reference to policy transfer, in this case from the United States and more specifically, Wisconsin. Anne Marie Slaughter has noted that there is in practice a form of global governance in operation.²⁴ Almost unnoticed by the general public, in a wide range of policy areas regular meetings and discussions between policy experts such each others' countries' existing policies to serious critiques and define best practices. At least some of these for a for discussion come close to being epistemic communities united by common understandings of what problems are and how they should be resolved. Some international organizations take the process of policy peer review to a fairly high level of institutionalization. At least until Bush II came to power, members of the G7 subjected their economic and budgetary policies to peer group review. The Stability Pact associated with the Euro not only provides for international review of members' policies but provides rules on budgetary policy that are supposed to be enforced with penalties if broken.

Simmons and Elkins provide a nice summary of the different pressures for change in policies that result from international factors. Countries may feel obliged to change policies because changes in the

Anne-Marie Slaughter "Everyday Global Governance" *Daedalus* Winter 2003 83-90

international environment have altered payoffs; failure to liberalize economic policy, for example, may result in loss of investment to other countries.²⁵ Countries that pursue unwelcome or costly environmental policies may face significant economic costs in an era of globalization as investment shifts to more favorable settings thus worsening the payoffs from existing policy. Pietro Nivola, for example, has argued that not only the content of US environmental regulations but the regulatory style with which they are developed and enforced imposes serious economic costs on the USA.²⁶ On the other hand, countries may change policies because they have learned from and been persuaded by the experience of other governments, particularly in countries with which they feel they have important cultural similarities. “Official communication and association....are plausible channels for policy diffusion.....”epistemic communities” and other intellectual and institutional linkages among policy leaders are important sources of policy change.” As both changes in payoffs and opportunities for policy diffusion are clearly present in environmental regulatory policy we might expect that environmental policy would be an area in which there is a high degree of policy transfer. Moreover, the conditions in environmental regulation seemed right for policy transfers to take root. As noted earlier, people in regulatory policy networks in many countries have come to believe that existing policy paradigms are exhausted or at least provide rapidly diminishing returns. Such disgruntled regulatory officials may serve as the

²⁵ Beth Simmons and Zachary Elkins “The Globalization of Liberalization: Policy Diffusion in the International political Economy” (unpublished paper) p. 25

²⁶ Pietro Nivola (ed.) *Comparative Disadvantage? Social Regulations and the Global Economy* (Washington DC: Brookings Institution 1997.)

“receptors” – the sympathetic group, interest or people -- that Jacoby argues are needed for successful policy transfer to occur.²⁷

What types of change might occur?

The first obvious possibility is convergence. The familiar “race to the bottom” argument suggested that countries would converge on the lowest possible levels of regulation in order to avoid losing investment. Vogel with characteristic flair argued that the opposite was as likely to occur; globalization and internationalization would cause countries to “trade up” to higher standards thus converging on stricter standards.²⁸ Countries with weaker regulations converge on the standards of those with stricter.

A second possibility is that everyone moves to a new model. The international communities of experts identify a new approach or policy and all countries shift to that approach. In contrast to a race to the bottom or trading up, all countries move away from their established policies and approaches.

A third possibility is that national differences persist. The international forces promoting convergence are insufficient to overcome the deeply entrenched and durable factors outlined earlier that create national styles of regulation.

Ironically, the development that dominated recent discussions falls into none of the above categories. We might describe it better by using the title of David Lodge’s brilliant novel, *Changing Places*. Jasanoff,²⁹ Vogel³⁰

²⁷ Wade Jacoby *Imitation and Politics: Redesigning Modern Germany* (Ithaca: Cornell University Press, 2000.)

²⁸ David Vogel *Trading Up: Consumer and Environmental Protection in a Global Economy* (Cambridge MA: Harvard University Press, 1995.)

²⁹ Jasanoff, *op. cit.*

³⁰ David Vogel “The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe” *British Journal of Political Science* forthcoming.

Kollman and Prakash³¹ and all note the irony that in recent years on one of the most conspicuous of all regulatory issues, GMOs, Europe and the United States seem to have swapped places. Whereas the Europeans have displayed, depending on one's point of view, commendable zeal or irrational panic in regulating GMOs strictly until their safety is absolutely proven and have been highly confrontational in their dealings with the industry, Americans have been (again depending on one's point of view), sensible or negligent in accepting assurances that genetic engineering is safe and have engaged the industry in a relaxed collaborative relationship. In the United States, the public seems to have accepted the assurances of the industry and government experts that genetic engineering poses no danger and is beneficial; in Europe, regulators have apparently felt obliged to regulate strictly. This trading places by the US and Europe would seem to pose some embarrassing questions for those – including this author and Vogel -- who have argued that there are persistent national styles of regulation. How might we explain the apparently awkward fact that Europe and the US have trade places? Several obvious possibilities present themselves.

First, we might explain the change in terms of the emergence of a new regulatory actor. Prior to 1980s, national governments made regulations in Europe; now the EU does. This change may in itself have important consequences. First, the EU may be attracted to stricter modes of regulation for one of the same reasons that the United States is said to incline to highly legalistic and rigid regulations; both have to worry about how regulations will be enforced in large and diverse polities. The EPA may think that regulatory flexibility will be used wisely in Wisconsin but not in

³¹ Kelly Kollman and Aseem Prakash “Biopolitics in the EU and the US: A Race to the Bottom or Convergence to the Top?” *International Studies Quarterly* (forthcoming.)

Mississippi; the EU may think that flexibility will enhance regulatory outcomes in Sweden but not in Greece or southern Italy. As Majone has argued³², the EU is also a regulatory state. Possessing very limited power to tax and spend, the EU asserts and increases its authority by issuing regulations. Institutional self interest therefore makes the EU more – and more controlling – regulations. It could also be that the GMO regulations provided the EU with another means for defending the core (if totally discredited) policy it administers, the Common Agricultural Policy (CAP) by in effect excluding imports. Finally, as Vogel described earlier, the EU provides an ideal setting for “trading up” in which nations with strict standards force competitors in other member countries to incur their high costs also by means of a European wide regulation.

It is implicit in such arguments that had the EU not existed, or perhaps if it had not embarked on a program of closer integration in the 1980s, Europe and the EU would not have traded places. The US would have remained associated with strict, legalistic and overly costly regulations, Europe with the opposite. However, Jasanoff, Vogel and Prakash offer deeper explanations for why the two traded places. For Kollman and Prakash, the change show that “the effects of globalizing processes on domestic regulatory styles are contingent and uneven.”³³ Factors such as the relative weakness of the biotech industry in Europe and its strength in the US, the destruction of confidence in the European style of regulation because of the “mad cow” crisis and contrasts in which institutions within the EU and US first successfully asserted their authority over the issue

³² Giandomenico Majone *Understanding Regulatory Growth in the European Union* (Fiesole: European University Press, 1994.)

explain why regulatory style changed. Jasanoff only partly accepts the “trading places” argument as she sees an important continuity in US contrasts between the US and Europe. She notes the importance of political developments in the Reagan era in reducing confrontational, legalistic tendencies in the US. As I had argued at the time,³⁴ the appointment of pro-business regulators to agencies such as EPA and OSHA combined with an assertive use of the OMB to restrain the agencies produced important changes in policy. A similar shift in the attitude of the federal courts also moderated regulatory zeal; previously the courts had been a major force for stricter regulation. But Jasanoff sees an abiding aspect of American exceptionalism in the competitive pluralism of its science. Pluralism within science can result in both pressures for stricter regulation (Alar) and weaker regulation (GMOs and global warming) than would occur in Europe as each side can produce experts to support its story.³⁵ Vogel, of course, argues very clearly that the US and Europe have indeed traded places. The causes of this shift are a series of regulatory failures in Europe (such as mad cow and the blood scandal in France), citizen support for more risk-averse policies and the growth in the regulatory competence of the EU.³⁶ He places most emphasis in his conclusions, however, on what is highly contingent circumstance. “...*the most powerful explanation for the relative stringency or innovativeness of consumer and environmental regulations in the US and*

³³ Aseem Prakash and Kelly Kollman “Biopolitics in the EU and US: A Race to the Bottom or Convergence To the Top?” forthcoming *International Studies Quarterly* p. 23.

³⁴ Graham K. Wilson “Social Regulation and Explanations of Regulatory Failure” *Political Studies* v32 no.2 (1984). 203-225.

³⁵ Jasanoff “American Exceptionalism and the Political Acknowledgement of Risk”

³⁶ David Vogel “The Tortoise and the Hare Revisited: The New Politics of Consumer and Environmental regulation in Europe” forthcoming *British Journal of Political Science* p. 23.

Europe is the time frame during which they were enacted."³⁷ As Gordon Brown likes to argue about the economies of the Eurozone and UK, they just happen to be on different cycles. In the course of time, business will mobilize sufficiently to rein in regulatory excess in Europe just as it did in the USA after (according to Vogel), 1990. The burst of regulatory enthusiasm in Europe just happened to occur some twenty years after its equivalent in the United States.

Structural Impediments to Change

Life is complicated. However, reliance on contingency in explanations is the enemy of theorizing. Conclusions that individual crises such as mad cow or the transient character of historical eras can overwhelm the relatively enduring factors which we used to use to explain national styles of regulation. One way to try to see through the fog of contingency is to simplify matters by reducing the number of variables that are involved. In particular, it helps to look at what has happened in enduring political units such as nation states and avoiding the complication caused by the rise of the European Union as a new regulatory actor.

There are no doubt numerous attempts in progress around the world today to change regulatory systems. A combination of circumstances gave me the opportunity to study two attempts to change regulatory systems that promised to provide interesting theoretical tests.³⁸ These attempted changes

³⁷ *Ibid.* p.38

³⁸ This section is based largely on interviews with those involved in the Green Tier project in Wisconsin (legislators, DNR officials, interest groups staff) and with officials in the Department of the Environment, Food and Rural Affairs (DEFRA), the Environment Agency, financial institutions and public interest groups in the UK. See various papers on my web site

were made in two settings that are variously characterized as “liberal” or “Anglo-American” in character, namely an American state (Wisconsin) and the United Kingdom. In liberal economies, economic interests and government are supposed to have a more distinct, “arm’s length” relationship. In both cases, governments attempted to transfer approaches to regulation from countries in continental Europe generally characterized as having in Soskice and Hall’s terminology more “organized” forms of capitalism.³⁹ Government and economic interests are more closely connected in “organized capitalist” systems in governance networks sharing responsibility for tackling major problems. In both settings, governments were motivated in part by the belief that the established approaches to environmental policy had reached their limits and in part by concern that in an era of globalization, it was undesirable to pursue environmental improvements through a welter of new regulations that might frighten away investment. Wisconsin has long struggled to dispel the belief that it is a “tax hell” inimical to business in its policies. The UK has succeeded for some time in attracting a disproportionately large share of direct foreign investment into the UK, in part by arguing that it provides a less regulated, more flexible economy in which to do business than the continental European nations. In both Wisconsin and the UK, therefore, governments were motivated to try to adopt new regulatory approaches by the quest for better practice endogenous to the environmental policy network and the search for methods of improving the environment acceptable to business that we have encountered above in debates about policy transfer in general. The

<http://www.lafollette.wisc.edu/FacultyStaff/Faculty/Wilson/Wilson.html> especial “Importing Cooperation.”

³⁹ Soskice and Hall *Varieties of Capitalism*

actual policy approaches that governments attempted to transfer into Wisconsin and the UK differed, however.

Wisconsin provided a very clear and consciously motivated attempt at policy transfer. Attracted in large part by the lower levels of political conflict between business, environmentalists and government in the neocorporatist countries, policy makers visited the Netherlands and Bavaria in quest of approaches that could be used in Wisconsin. The result was an initiative known as Green Tier. Green Tier sort to promote “beyond compliance” behavior by business in order to improve the environment and to build more trusting, collaborative relations between government, business and environmentalists. Green Tier provided two levels of recognition for businesses that demonstrated a sound track record of compliance and a willingness to improve actively their environmental performance. In the higher level, firms that committed to environmental management systems and environmental goals in programs that were discussed with “stake holders’ in the community and independently audited were promised a certain degree of easing in government regulation. Well intentioned businesses would therefore be given some of that flexibility in deciding how to use their resources in pursuit of environmental improvement that they had long demanded. A Green Tier Council appointed by the Governor but representing the parties involved – business, environmentalists and government – would oversee the program. It was hoped that the iterative discussions between these groups would gradually build trust and cooperation. The Green Tier Council was very directly shaped by discussions of how government and interest groups interact in neocorporatist countries. The program was to include financial assistance for environmental groups to enable them to participate fully.

The approach adopted by the Blair government in Britain was less explicitly modeled on practices in other countries but was none the less inspired by the idea of sharing governance responsibilities with economic actors. There were several aspects to this partnership. The first was to persuade companies to voluntarily undertake annual reports on their environmental impact and measures they were taking to reduce it. Environmental reporting would both focus attention within companies on environmental issues and enable stakeholders outside the company to exert pressure on it. The second stage as to enlist the support of private sector interests with a stake in improved environmental performance to join the campaign for environmental reporting and improvement. Insurance companies, accountants and stock exchange authorities were convinced that they had a stake in the program. Large insurance companies such as Aviva were convinced that problems such as global warming were contributing to escalating insurance claims; Aviva agreed to vote stock it owned through its trading subsidiary, Morley Finance, against the adoption of annual accounts not accompanied by adequate environmental reports. Accountants and the Stock Exchange were convinced that companies could not be valued properly without establishing what risks they were subject to and how those risks were being managed; risk could not be assessed without adequate environmental reporting. Perhaps it would not be too cynical to note that environmental reporting would also generate new jobs for accountancy firms. These attempts to improve the environment were with one exception based on cooperation, not legislation. The one exception was the introduction of a statutory requirement on trustees on pension funds to announce publicly each year whether they took environmental and social factors into account in investment decisions. This was highly reminiscent of

the coordinated capitalism found in countries such as Germany. Finally, the government introduced a new series of taxes such as the Climate Change Levy (CCL) and Aggregates Levy on environmentally damaging activities. However, the taxes would be more or less totally rebated to industries that negotiated environmental agreements with the government. This bargaining between government and business for environmental improvement was highly reminiscent of practice in neocorporatist countries such as the Netherlands.

What actually happened to these attempts?

The short answer in Wisconsin is “not much.” The Green Tier program was endorsed unanimously by a Green Tier Advisory Committee that was a prototype for the Green Tier Council. Business leaders, environmentalists and government officials coalesced around the plan creating hopes that it would be enacted rapidly by the Legislature. In order to achieve the speediest possible passage, Green Tier was tacked on to one of Governor Thompson’s Budget bills. Thereafter, things fell apart. The major business organization, Wisconsin Manufacturers and Commerce (WMC) reneged on the agreement to support Green Tier, pure and simple. Instead it sort the addition of a provision for audit immunity – the automatic exemption from penalties of corporations that report a breach of regulations themselves. WMC secured the support of the Governor’s staff who added it to Green Tier in the Budget. Audit immunity might not be regarded as unusual in the European context. However, audit immunity had been explicitly rejected in the Green Tier Advisory Council discussions; WMC’s action in seeking to add it subsequently was, as many business representatives recognized, very bad faith. Thereafter, however, the WMC clung to its position and the Green Tier continued to languish legislatively.

As time passed, Green Tier lost some of its European flavor; the Green Tier Council disappeared from later legislative drafts leaving it as a simpler system of promises of reduced regulation for corporations that engaged in “beyond compliance” behavior. The idea of providing assistance to facilitate participation by environmental groups was also abandoned. The nascent spirit of compromise and cooperation between stakeholders withered; the Wisconsin branch of the Sierra Club, whose endorsement of Green Tier had been seen as a major achievement, backed away in 2003 opposing both legislation that included Green Tier plus audit immunity and also Green Tier itself. While it remained possible that one day Green Tier would be enacted, it was likely that it would in any case be a vastly scaled back version.

The story in the UK was more complicated. Michael Meacher, the Minister for the Environment from 1997 to 2003, devoted considerable efforts to promoting the voluntary use of environmental reporting by companies. He even enlisted the help of the Prime Minister, Tony Blair, who made a personal appeal to the CEOs of large companies to adopt the process. There were periodically discussions of making environmental reporting mandatory; however, partly because of concerns expressed by the Department of Trade and Industry (DTI) about destroying Britain’s image as the less regulated, more flexible economy, the program remained voluntary. In short, it relied on appeals to business to accept a responsibility for self governance that would have been familiar in Germany. But did the approach work in Britain? The answer depends in large part on how success is defined. Government sources emphasize that the vast majority of Britain’s largest firms now do environmental reporting.. Critics note that a significant proportion – at least a fifth – do not and that many environmental reports are of very limited quality or utility. A report by SalterBaxter in summer 2002

concluded that 103 of the top 250 FTSE 250 companies produced substantial environmental (and sometimes social) reports. However eight-seven companies had no more than short notes in their annual reports and the rest provided limited data with no detail Only thirty six companies had their annual environmental reports externally audited.

A similar story can be told about the environmental agreements negotiated by industries in return for rebates of environmental taxes. Government sources suggest that the scheme has been entirely successful. Critics note that in practice the scheme has been limited to a very restricted range of industries so that only about 43 agreements are in place. Government officials admit in private that the number of agreements that can be made is limited by a recurring problem in the British political economy. Some industries have strong, effective trade organizations; others many do not. Some of the industries that lack effective trade associations are relatively to easy because they are dominated by a few, very large companies. Many industries without a strong trade association are not. Thus the scope for promoting effective environmental agreements was limited by the character of British industrial organizations. Because the potential for negotiating tax remissions was limited by the inability of many industries to organize to make environmental agreements in return for tax concessions, the government was forced to modify the CCL in order to reduce the danger that it would reduced the competitiveness of British industry.⁴⁰

⁴⁰ John Griffiths “Brown looks Less Green After Easing Environment Taxes” *Financial Times* 10 November 1999

Implications

The stories presented above are of course open to the objection that they are very limited examples of very recent attempts at policy transfer. Perhaps both will leave an important legacy; as Dolowitz has argued in the case of British welfare policy, policy transfer can promote a greater degree of change than purely domestic pressures or policy innovations would produce. However, the stories do remind us that at least some of the factors that were seen as producing enduring national styles of regulation still count.

First, institutions matter. The crucial reason that Green Tier was not speedily enacted in Wisconsin was that institutions did not provide for bounded, iterative games between stakeholders. The Green Tier Advisory Council did. However, WMC, seeing no reason not to take every advantage open to it as a pressure group, decided after that game was over to try its luck in a branch of the government (the Republican controlled Governor's office) where it expected to have greatest leverage. There was nothing particularly evil about this; as soon as the Democrats captured the governorship, environmental groups such as the Sierra Club tried the same approach abandoning Green Tier in the hopes of doing better by doing so. Cooperative modes of regulation take place in contexts where institutions provide, what in an over-used word, is often called closure. Agreements and decisions are made and stick. In American institutions, agreements may be made (as with Green Tier) but are then abandoned because a better outcome may be available by changing the institutional venue.

Second, interest group structures count. British companies did not readily accept the degree of responsibility for governance associated with their German counterparts. Years of cajoling to adopt environmental reporting produced limited results. Some companies refused to comply and

many more did so minimally. The program of leveraging superior environmental performance through rebating taxes to industries that negotiated environmental agreements was constrained by the limited number of industrial sectors with adequate organization to conduct the necessary negotiations.

Finally, culture counts. Many British executives believed that they were responsible for maximizing profits, not environmental policy. The WMC officials believed that they were responsible for achieving maximum policy advantage in the short term, not for building long term cooperation between stakeholders and the government. “We are an interest group, after all” said one WMC official in explaining why the group sacrificed possible long term change to short term advantage.

Conclusion

It has long been argued that national styles of regulation are deeply embedded and therefore, it is assumed, resistant to change. More recent scholarship has suggested that there is more scope for shifts in regulatory styles; in particular, Europe and the US have “traded places” in terms of their regulatory style. This more recent scholarship emphasized the importance of highly contingent influences such as the character of an historical era or important events such as the mad cow crisis. The increased possibility of policy transfer makes it likely that shifts in regulatory style will occur.

This paper has argued in contrast that the example of shifts in the character of European and US regulatory styles may be misleading because they are based not on change in an established regulatory style but on the advent of a new actor in regulation, the European Union. Within the context

of the same institutions, as for example in Wisconsin and the UK, attempts to adopt new styles of regulation remain highly constrained by the familiar variables of institutions, interest group systems and culture.