The New Politics of Risk Regulation in Europe and the US

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INTRODUCTION

This essay describes and explains an important shift in the pattern of consumer and environmental protection policies in Europe and the United States. From the 1960s through the early 1990s, American regulatory standards tended to be more comprehensive, risk-averse and innovative than in either individual European countries or in the European Union (EU). However since the mid 1990s, the reverse has often been the case: during the last 15 years, a number of significant regulatory standards promulgated by the EU have been more comprehensive, risk-averse and innovative than those adopted by the US.

To borrow Lennart Lundqvist’s formulation, which he used to contrast American and Swedish air pollution control standards during the 1970s, since around 1990 the American “hare” has been moving forward at a tortoise pace, while the pace of the European “tortoise” more closely resembles that of a hare. To employ a different metaphor, in a number of significant respects European and American regulatory politics have “traded places.” In an earlier period, regulatory issues were more politically salient and civic interests more influential in the United States than in most individual European countries or the EU. More recently, this reverse has been true. Consequently, over the last fifteen years, the locus of policy innovation with respect to many areas of consumer and environmental regulation has passed from the US to Europe.

In an essay published in 1990 entitled “American Exceptionalism and the Political Economy of Risk,” Jasanoff writes that while “the US process for making risk decisions impressed all observers as costly, confrontational . . . and unusually open to participation,” in
Europe, “policy decisions about risk, remained, as before, the preserve of experienced bureaucrats and their established advisory networks.”\(^2\) Her generalization about European and American policy styles and policy consequences which flow from them are echoed in virtually every comparative regulatory study published during the 1970s and 80s.\(^3\) This generalization must now be re-examined. The “American approach” to health, safety and environmental regulation is no longer as distinctive as it appeared to scholars during the 1970s and 80s.\(^4\)

Yet the result has not been increased policy convergence. Instead recent European regulatory politics and policies resemble those of the US of the 1970s and 80s, not the 1990s. Since around 1990, consumer and environmental problems have lost much of their sense of urgency and regulatory issues have become less politically salient. As a result, political pressures for additional regulation have declined. Yet at the same time, there is little support for rolling back previously enacted standards. The result has been political stalemate: after more than two decades of relatively steady expansion, American consumer and environmental regulation has changed only marginally since around 1990. But while regulatory policy window has narrowed in the US, it has opened wider in Europe. Thus notwithstanding the powerful pressures of economic globalization, European and American risk management policies in the areas of consumer and environment protection are not converging.

This essay primarily focuses on changes in regulatory policies and politics in Europe. It argues that these changes are due to three inter-related factors: a series of regulatory failures that have created a substantial gap between public expectations and policy

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\(^1\) While the European Union was known as the European Community during some of the time-period examined in this article, for the purposes of clarity only the former term will be used. Legally most EU regulations take
effectiveness, the increased political influence of pro-regulation interest-groups and political parties within several Member States and the EU, and the growing regulatory competence of the EU. The latter’s institutional structure and political environment has facilitated the development of an expanded European “regulatory state” in a number of ways. In particular, its decision-making structure has both magnified the political influence of the “greener” Member States and provided representatives of civic interests with multiple points of access to the policy process, in part by increasing the policy role of the European Parliament. Politically, the EU’s commitment to the maintenance of a single market has provided policy-makers with an important incentive to support relatively stringent standards in order to maintain public support for European integration – a policy commitment which has been reinforced by each successive constitutional treaty.

This essay begins by exploring the emergence and significance of the precautionary principle within Europe. It then describes some of the specific ways in which the relative stringency and scope of European and American regulatory standards has shifted since around 1990. The final sections of the essay explain why regulatory politics and policies have changed in both Europe and the US – though in opposite directions.

**THE PRECAUTIONARY PRINCIPLE AND REGULATORY REFORM**

The increased legal and political influence of the precautionary principle represents an important dimension of the new European approach to health, safety and environmental standards. This principle legitimates regulation when “potentially dangerous effects deriving from a phenomenon, product or process have been identified, and . . . scientific evaluation does not allow the risk to be determined with sufficient certainty [because] of the insufficiency of the data or their inconclusive or imprecise nature.”

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5 Originally developed in the form of directives; however for the purposes of comparative analysis, they are referred to as regulations.
Germany during the 1970s and 80s, it was incorporated in the 1993 Treaty of the European Union and since 1994, it has been referenced in more than thirty reports and resolutions of the European Parliament.

While the precautionary principle cannot be divorced from science, since “a scientific view of the risk is an essential component of the evaluation of risk that the principle anticipates,” its growing popularity in Europe reflects the perception that scientific knowledge is an inadequate guide to regulatory policy. It both requires the extension of scientific knowledge and while simultaneously acknowledging “the possible intrinsic limitations of scientific knowledge in providing the appropriate information in good time.” In effect, it reduces the scientific threshold for regulatory policy-making. By mandating or precluding regulatory action, in advance of scientifically confirmed case-effect relationships, the principle, “curtails the ability of politicians to invoke scientific uncertainty as a justification for avoiding or delaying the imposition of more stringent protection measures.”

While its legal significance at both the EU and national level remains unclear, the practical effect of the precautionary principle has frequently been to permit, or even mandate, the adoption of more risk-averse policies. It explicitly acknowledges the inherently political nature of regulatory decision-making by enabling policy-makers to take into account a wide variety of non-scientific factors, including public opinion and social values. As Jordan and O’Riordan observe, “The stringency with which the precautionary principle is applied depends upon and is also a useful barometer of deeper social and economic changes. Precautionary measures, for example, are most likely to be applied when public opinion is instinctively or knowledgeably risk-averse.”
The frequency with which the precautionary principle has been evoked in Europe among both activists and policy-makers also has an ideological dimension. It reflects not only a decline in the role of science as a guide to policy-making, but also a decrease in public confidence in the benefits of technological innovation. Frequently underlying its invocation is the assumption that modern technology poses dangers of which we are unaware and that to avoid future harm we need to introduce new technologies more cautiously. As Corrine Lepage, the former French Environment Minister writes in her co-authored book on the precautionary principle, “The precautionary principle precisely responds to the need for prudence when faced with the consequences of technological progress, whose repercussions are exponential and unknown.”¹⁰ For many environmentalists, this is precisely one of its most important attractions.

Yet somewhat paradoxically, European regulatory administration is also becoming more scientifically rigorous. At both the national and the EU levels, there is increased recognition of the need to strengthen the capacity of government agencies to conduct risk assessments and to improve the quality of scientific information available to decision-makers. An important factor underlying this development is an increase in judicial review of regulatory decisions at both the European and international levels.¹¹ Just as American regulatory agencies conducted risk assessments in order to be able to defend their decisions in federal court from challenges by both public interest groups and industry, so Europe’s national authorities and the EU are undertaking similar steps in order to defend their decisions before the European Court of Justice (ECJ) and World Trade Organization (WTO) dispute panels.
European regulatory institutions have also changed. In particular, to improve the quality of regulatory decision-making, risk assessment is increasingly being separated from risk management. The former is the advice and information scientists provide to policy-makers; the latter is what policy-makers decide. This separation has been institutionalized at the EU level by the establishment of regulatory agencies such as the new food safety agency that will perform risk assessments, with policy decisions made by the Commission. Similar models have been adopted for food safety agencies in France and Britain. This separation has a number of purposes. Most obviously, it is designed to prevent “regulatory capture” by making regulatory policy-making more transparent: when risk assessments are made public, the public can determine the extent to which political officials are accepting or ignoring the relevant scientific advice. Secondly, it enables policy-makers to take into account considerations beyond science in making regulatory decisions, such as public attitudes. Thirdly, it protects the integrity of the risk assessors since their only role is to provide scientific information to policy-makers. But perhaps most importantly, it makes policy-makers more politically accountable for regulatory policy-making: if irreversible harm results from their decision or non-decision, it is now clearer whom to blame.

**THE HISTORICAL CONTEXT**

From the 1960s through the mid 1980s, consumer and environmental protection standards were typically more stringent in America than in Europe. According to a comprehensive comparative study of chemical regulation published in 1985, more often than not, the US was the first country to take significant restrictive action on suspected or confirmed human carcinogens. For example, the American Environmental Protection
Agency (EPA) found the pesticides aldrin and deildrin to be carcinogenic, while on the basis of the same studies British authorities concluded that they did not present a risk of cancer. The US subsequently banned most uses of these pesticides while Britain imposed no restrictions. Red Dye No. 2 was banned in the US, while its use was only restricted in Europe. In 1971 EPA banned DDT while its use was only restricted in Britain, Germany and France; nearly a decade lapsed before it was banned by the EU.

Furthermore, many American chemical regulations were also more stringent and comprehensive. The 1958 Delaney clause to the Food, Drug and Cosmetic Act, which banned the use of any food additive if tests revealed that it caused cancer in either laboratory animals or humans on the grounds that such chemicals could cause irreversible harms, had no counterpart in any European country. The 1976 American Toxic Substances Control Act (TSCA) established regulations for both new and existing chemicals while the EU’s 1979 Sixth Amendment only established regulatory procedures for approving new chemicals. (French, British and German national law did contain provisions for reviewing existing chemicals, but only in exceptional circumstances.) A similar pattern held with respect to pesticide approval and renewals; American statutes enacted in 1972 and 1978 required more comprehensive reviews of existing pesticides than did either EU regulations or those of any Member State.

In the critical area of automotive emission standards, the American standards enacted in 1970 and 1977 were consistently stricter than the five increasingly stringent standards enacted by the EU between 1970 and 1985. For example, while the US enacted legislation requiring all new cars to be equipped with catalytic converters and thus only use unleaded gasoline (petrol) in 1970, the EU did not adopt a similar requirement until 1989. During the
1980s, Sweden, Denmark and Germany, three of Europe’s most consistent environmental innovators, phased in standards comparable to those of the US after the US. 17

During the mid 1970s, the issue of ozone layer depletion emerged as a major political issue in the US. Though there was considerable unscientific certainty about both the causes and magnitude of this environmental problem, the 1977 Clean Air Act Amendments authorized restrictions on CFCs on the grounds that a “reasonable expectation” of harm was sufficient to generate regulatory action. 18 However even before this law was passed, EPA, acting under authority of TSCA moved to prohibit the use of CFCs as aerosol propellants in nonessential applications. This decision affected nearly $3 billion worth of household products. Within three years, nearly the entire US aerosol market had switched to non-CFC technologies. By contrast, in Europe, the issue of ozone depletion was less politically salient and the political influence of chemical producers much greater. The EU initially refused to act but in 1980, in response to American pressures, it agreed to a 30% decrease from 1976 levels by 1981 – a reduction characterized by one European scholar as “a minimum solution.” 19 Subsequently, the Montreal Protocol phased out the use of ozone depleting chemicals on both sides of the Atlantic.

In the area of consumer protection, the US established more stringent standards for the approval of prescription drugs than did any European country. After the scandal surrounding the near approval of thalidomide by the Food and Drug Administration (FDA), in 1962 Congress enacted the Kefauver amendments to the Food, Drug and Cosmetic Act. This legislation significantly increased both the time and expense for securing approval for new prescription drugs in the US. The result was a substantial cross-Atlantic “drug lag,” with new drugs typically approved years earlier in Germany and Great Britain than in the
According to a US Government Accounting Office study which tracked the introduction of 14 significant new drugs, 13 were available in Europe years before they were approved for use in the US.

In sum, “studies of public health, safety and environmental regulation published in the 1980s revealed striking differences between American and European practices for managing technological risks.” Moreover, “these studies showed that U.S. regulators were quicker to respond to new risks, more aggressive in pursuing old ones . . . .” But since the mid 1990s, in a wide range of policy areas it is now European regulators who have become “quicker to respond to new risks, more aggressive in pursuing old ones.”

**THE NEW EUROPEAN RISK REGIME**

One important area in which EU policies have become more stringent than in the US is food safety. Europe and the US have historically had different food cultures, with many European consumers and some governments more willing to accept the risks of traditional foods such as raw milk cheeses and cured meats than the US, while Americans have been more open to new food technologies. However, since the 1990s, differences between European and American food safety regulations have become more pronounced. A 1985 Council of Ministers directive banned the use of all growth hormones for cattle. The Directive’s approval followed a vigorous public campaign led by the Bureau of European Consumer Unions, a coalition of national consumer unions. Although the EU’s own scientific advisory bodies subsequently concluded that the five disputed hormones did not pose a threat to human health, and the European producers of the hormones vigorously opposed the ban, in the end public pressures proved decisive. As Franz Andreissen, the EC’s farm commissioner put it, “Scientific advice is important, but it is not decisive. In public opinion, this is a very
delicate issue that has to be dealt with in political terms." By contrast, in the US, the safety of the five growth hormones never entered the political agenda.

A related area in which the EU and the US adopted divergent policies involved BST, a hormone designed to boost milk production. The EU imposed a moratorium on its use in 1989, which was made permanent in 1999. According to an EU official, the Commission feared a “consumer backlash . . . it’s not easy to explain to consumers that everything is all right when you are injecting drugs into cows.” By contrast, notwithstanding a determined effort by consumer groups, and some small milk producers, BST was approved for use in the US in 1993. Similarly, in 1989, the EU banned the use of most antibiotics in animal feed and in 2001 announced plans to ban all use of antibiotics as growth-promoters by 2006. No comparable restrictions have been imposed in the US. American regulations governing food irradiation have also been more permissive than those adopted by the EU in 1997. While the EU banned the use of mammal based proteins (farines) for all animals in 2000, the US continues to permit their use in feed for farm animals other than cattle.

The EU has adopted a much more extensive array of animal protection measures than the US, including for example, banning the use of leg-hold traps for capturing wild animals in 1991. In contrast, the US only adopted a partial ban following pressures from the EU in 1997. In 1999, the EU issued strict standards for the size of cages for battery hens and for the treatment of animals in transit. Such rules remain non-existent in the US.

The regulation of genetically modified (GM) foods and seeds in Europe and America provides a striking illustration of the pattern of recent European and American approaches to consumer and environmental regulation. The US initially chose to regulate both GM foods and seeds under existing laws, while EU legislation established a distinctive and complex set
of new regulatory requirements that apply only to this new agricultural technology. However, when EU standards for the commercial authorization of agricultural biotechnology were first issued in 1990 they did not differ substantially from those of the US. But after opposition to GM seeds and foods surfaced in Europe in the mid 1990s, European regulatory policies became increasingly restrictive. To date, while the EU has issued eighteen licenses for biotechnology products, including for nine GM crops, the US Department of Agriculture has approved fifty and the EPA has approved eight. Nearly three-quarters of the world’s GM crop acreage is in the US; hardly any is in Europe. The EU and a number of Member States have enacted strict labelling requirements for GM products, while the US only requires that such products be labelled if they differ from their non-GM counterparts. As of December 2003, the EU had not approved any new seed strains for more than five years while the marketing of new food products under the Novel Foods Regulation (1997) has been effectively halted. Foods grown from GM seeds are seldom found in European stores, largely because of EU labelling requirements, while their use is pervasive in the US, where there are, in effect, no labelling requirements.

Recent cases of more stringent or innovative European consumer and environmental regulations are not confined to food safety or agriculture. While public or quasi-public eco-labelling schemes spread from Germany and Sweden to much of Europe during the second half of the 1980s and were adopted by the EU in 1992, they continue to play little role in the United States. In 1994, both inspired and pressured by policies previously adopted by Germany and Denmark, the EU established ambitious recycling targets for glass, paper, plastics and aluminium. In the US there are no federal regulations governing packaging
wastes; recycling requirements remain governed by local laws, which are typically less stringent and comprehensive than the 1994 EU directive.

In 2000, the EU approved an automobile recycling Directive, which, in addition to providing for the collection of vehicles at the end of their useful life, requires carmakers to recycle or reuse 80% of car weight by 2006 and 85% by 2015. It also bans the use of heavy metals such as lead, mercury and cadmium as of 2003. A 2003 EU Directive made manufacturers responsible for the “life-cycle” of all electronic products. This Directive mandates collection standards for ten categories of products including all household appliances and telecommunications equipment. A related Directive phases out and ultimately prohibits the use of heavy metals such as lead, mercury and cadmium in electronic products and batteries in order to promote recycling and reduce the toxicity of solid wastes and thus protect landfills. Neither regulation is on the national political agenda in the United States, and there have only limited policy initiatives at the state level. The 1990 US Clean Air Act Amendments did continue the pattern of more stringent American automotive emission standards, though in the case of heavy duty vehicles, EU standards adopted in 1998 are more stringent than those of the US.

The EU has also replaced the leadership role of the United States in addressing global environmental problems. Through the 1980s, most major international environmental agreements—most notably the London Convention on Dumping at Sea, (1972), the Conventional on International Trade in Endangered Fauna and Flora (1973), and the Montreal Protocol (1987), which phased out the use of CFCs to protect the ozone layer — were both initiated and strongly supported by the United States, and subsequently ratified by either individual European countries or the EU. “Since the early 1990s, however, effective
US international environmental policy leadership has lapsed.” By contrast, by 1994 the Basel Convention on Hazardous Wastes (1989) had been ratified by every EU Member State but has yet to be ratified by the US. Both the Convention on Biological Diversity (1992) and the Biosafety Protocol (2000) were signed by the EU, but not by the US.

The EU, as well as each of the Member States, has ratified the Kyoto Protocol (2002-3) an international treaty to reduce emissions of greenhouse gases, and a number of European nations have established policies to reduce carbon emissions. The US refused to ratify the 1997 Kyoto Protocol, was not a party to the 2001 Bonn agreement, and there are no federal controls on carbon emissions. Nor are any likely in the foreseeable future.

The change in the relationship between European and American consumer and environmental standards can also be seen in the pattern of trade disputes between the EU and the US. Earlier trans-Atlantic trade disputes typically involved complaints by the EU or its Member States about the American use of regulatory standards as non-tariff barriers. Thus complaints were filed about American automotive fuel economy standards (adopted in 1975), Superfund taxes (adopted in 1986), and a ban on tuna imports to protect dolphins (adopted in 1990). But for complaints based on policies of more recent origin, it is the US which has typically challenged European regulations as non-tariff barriers. With the exception of the 1985 beef hormone ban, the European policies about which the US has complained have been enacted since 1990. These include the EU’s leg-trap ban (1991), eco-labelling standards (1992), and most importantly, restrictions on the sale and labelling of foods grown from GM seeds (1990, 1997 through present).

The following chart provides a schematic overview of changes in the relative stringency of European and American consumer and environmental regulations.
Chart 1. Relative Stringency of European and American Regulations
An x denotes a relatively stringent or innovative standard.

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<th>1970s – 1990</th>
<th>early 1990s - present</th>
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<td>EU</td>
<td>USA</td>
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**Agriculture**
1. Beef hormones
2. Milk hormones x x x
3. Antibiotics in animal feed x
4. Genetically modified agriculture x
5. Battery hen cages x
6. Leg hold traps x

**Industry**
7. Automobile emissions x x x
8. Chemicals x x x
9. Pesticides x x x
10. Packaging recycling x
11. Automobile recycling x
12. Electronics recycling x
13. Ozone Protection x x x
14. Curb on Greenhouse Gases x
15. Restrictions on Hazardous Waste x Exports
16. Eco-labeling x
17. Ban on Heavy Metals in Electronics x

In some cases, American standards have remained more stringent, while in other cases European and American standards have both become more stringent. But compared to the 1970s and 80s, since around 1990 European standards are more likely to be more stringent than their American counter-parts.

**EXPLAINING THE NEW EUROPEAN REGULATORY REGIME**

What accounts for these changes in European regulatory policies and institutions? Explaining a complex set of developments over a period of nearly two decades presents a difficult analytical challenge. However, three inter-related factors appear to have contributed
to these policy shifts. They are: a series of regulatory failures and crises, the broadening of political support for more risk-averse regulatory policies within Europe, and the growth of the regulatory competence of the EU.

The Regulatory Failure Cycle

A key factor contributing to the increased stringency of health, safety and environmental regulation in Europe has been a series of regulatory failures and crises that placed new regulatory issues on the political agenda and pressured policy-makers to adopt more risk averse or precautionary policies. The effect of each crisis has been cumulative, making public opinion progressively more risk averse, more sceptical of scientific expertise and more mistrustful of existing regulatory institutions. Each crisis has also spilled over into unrelated policy areas.

1986 witnessed both the nuclear accident at Chernobyl and the Sandoz chemical fire on the Rhine, both of which had significant trans-border health and environmental consequences. The Washington Post observed in December, 1988: “Dead seals in the North Sea, a chemical fire on the Loire, killer algae off the coast of Sweden, contaminated drinking water in Cornwall. A drumbeat of emergencies has intensified the environmental debate this year in Europe, where public concern about pollution has never been higher.”38 According to Elizabeth Bomberg,

These disasters made an impact. In 1992, the protection of the environment and the fight against pollution had become an ‘immediate and urgent problem’ in the view of 85% of EU citizens. . . . Eurobarometer surveys in 1989 and the early 1990s registered up to 91% of EU citizens expressing support for a common European policy for protecting the environment. . . . Questions on the environment evoked
stronger and more positive support for unified EU action than did questions concerning any other area of policy.\textsuperscript{39}

During the latter half of the 1990s, Europeans experienced a second wave of crises, this time involving food safety. The most important of these was mad cow disease.\textsuperscript{40} When BSE (bovine spongiform encephalopathy) was first detected in cattle in the UK in 1982, the European Commission accepted assurances from the British Ministry of Agriculture that it posed no danger to humans. Subsequently, Britain was forced to notify other EU Member States of a potential food safety problem, especially after scientific studies showed the disease was transmittable to mice. Following a massive outbreak of BSE in 1989-1990, the European Community banned human consumption of meat from the affected cattle. Although concern among the British public over the health effects of eating meat of BSE-diagnosed cattle continued to grow throughout the 1990s, the British government denied the legitimacy of the public’s concerns. Its position was accepted by the European Commission, which placed only limited restrictions on the sale of British beef.

The crisis over BSE broke in 1996 in the UK, when the British Government announced that ten cases of Creutzfeld-Jakob disease had been diagnosed in humans, and that these cases were likely related to exposure to cattle with BSE. The Commission responded by issuing a global ban on the export of British beef and requiring widespread slaughter of cattle in Britain, and to a lesser extent, in other Member States. While both the Commission and its scientific advisory body subsequently certified British beef as safe for human consumption, the EU’s belated recognition of its potential health hazards severely undermined public trust in EU food safety regulations and the scientific expertise on which they were based. It also led to the deaths of approximately 100 people, primarily in the UK.
As one British scholar put it, “the BSE scandal represents the biggest failure in UK public policy since the 1956 Suez Crisis.” It also emerged on the heels of a long line of food scares in the United Kingdom, including an outbreak of e-coli in Scotland, salmonella in eggs, and listeria. In 1999, a major public health scare emerged over dioxin contamination of food products produced in Belgium, leading to both the fall of the Belgium Government and the removal of all Belgium food products from stores throughout Europe, as well as a crisis involving the safety of Coca-Cola, though the latter turned out to have no scientific basis.

A senior European official noted in 2000, “the past years have seen a big dip in consumer confidence in the safety of the food supply and, as a consequence, in Member State authorities tasked with the job of overseeing the food industry. There seems to be an endless supply of [food scares].”

The regulatory failure associated with mad-cow disease had important political consequences. It dramatically exposed the gap between the single market – which exposes all European consumers to goods produced anywhere within the EU – and the inability of European institutions to assure the safety of the products sold within that market. At the EU level it led to the decision in December 2000 to create a European food safety agency. It also called into question the functioning of the “comitology” system, the EU’s term for the structure of advisory bodies that it relies on for expert advice. For the European Commission had relied on the advice of the Scientific Veterinary Committee that was chaired by a British scientist and primarily reflected the thinking of the British Ministry of Agriculture, Fisheries and Food – advice which subsequently proved flawed. Many of the changes in European regulatory administration reflect the effort to establish institutional arrangements that will
reduce the future likelihood of “regulatory capture, as does the EU’s official endorsement of the precautionary principle.”

There have also been regulatory failures in Europe in other policy areas. During the early 1990s, the French Government was widely criticized for responding too slowly to the public health and workplace dangers associated with use of asbestos. In spite of overwhelming evidence that asbestos constituted a serious health hazard, killing approximately 2,000 people a year according to a French government study, its manufacturing, importation and sale was not severely restricted until 1996, nearly two decades after the United States began to take regulatory action and after it had been banned in seven other European countries. Another, far more consequential scandal was the apparent failure of French governmental officials and doctors to protect haemophiliacs from blood contaminated with the AIDS virus. This issue, which became highly visible during the early 1990s, led to the resignation and criminal indictment of three senior government officials, including the Prime Minister. Three senior medical officials were convicted of criminal negligence and fraud and were sentenced to prison. Officials were accused of failing to adequately screen blood donors, delaying the approval of an American technology to test blood in order to benefit a French institute, and knowingly allowing contaminated blood to be given to patients. The deaths of more 300 haemophiliacs were linked to these decisions. While haemophiliacs were given contaminated blood in several countries, their rate of HIV inflection was significantly higher in France. As in the case of its regulation of asbestos, the French government’s regulatory failure was widely attributed to its placing domestic economic interests over public health.
“Le sang contaminé” (the contaminated blood) scandal in France, like mad-cow disease in the UK, had significant domestic repercussions. It shocked French public opinion, calling into question the public’s historic high regard for the competence of the public sector in a highly paternalistic state. It also continues to haunt French politicians, making them highly risk-averse, particularly with respect to potential threats to public health. Significantly, ministers have accepted nearly every recommendation of L’Agence Francaise de Securité Sanitaire des Aliments, France’s recently established food safety agency, which has statutory responsibility for reviewing all government food safety policies – lest they be accused of (again) endangering public health, and possibly face legal penalties. The French decision to maintain its ban on imports of British beef, made in defiance of the EU and against the advice of the Ministry of Agriculture, was taken in response to the recommendations of the AFSSA. (This decision has since been rescinded). The haste with which the French government responded to an increase in the number of BSE cases among French cattle in November 2000 by banning the feeding of farines to all animals – without even waiting for a scientific assessment by AFSSA – reflects the continuing impact of the contaminated blood scandal on French health and safety policies, as in part do French policies toward GMOs.48

Regulatory failures or crises are not by themselves politically determinative. After all, Europe had experienced regulatory failures prior to the mid 1980s. But the policy impact of the regulatory failures and crises during the second half of the 1980s and the 90s has been broader and deeper. Their cumulative impact has been to increase the public’s sense of vulnerability to and anxiety about the risks associated with modern technology and this in turn has affected the political context of regulatory policy-making, making public officials more precautionary or risk averse. As the Washington Post observed in the spring of 2001:
... wealthy, well-educated Europe is regularly swept by frightening reports of new dangers said to be inherent in contemporary life... Americans have health concerns, too, but not on this scale. The year is two months old and already in 2001 public opinion and public officials have been rattled by alarms over risks – proven and not – from genetically modified corn, hormone feed beef and pork, ‘mad-cow’ disease, a widely used measles vaccine, narrow airline seats said to cause blood clots and cellular phones said to cause brain damage. 49

A Shifting Political Landscape

A second, related, explanation for the change in European regulatory policies and institutions has to do with political developments within individual European countries. During much of the 1980s, support for strict environmental, health and safety regulations in Europe was geographically polarized. Typically, Germany, the Netherlands and Denmark favoured stricter and more risk-averse regulations, while Britain, France and Italy opposed them. 50 Much of EU environmental policy-making thus represented a struggle between the EUs three “green” Member States, where constituencies representing civic interests enjoyed considerable public support and influence and Britain, France and Italy, where they did not. Germany, the Netherlands, and Denmark continue to play a role as environmental “pioneers” within the EU, joined in 1995 by Sweden, Austria and Finland.

In part as a result to a series of regulatory failures, strong public interest and support for stricter health and environmental standards has spread south and west within Europe. This change in public and political preferences has been particularly significant in Britain and France, which are no longer regulatory “laggards” within Europe. “Britain has clearly emerged from the more minimalist and hostile stance of the early 1980s to emerge as a
medium-positioned state in the league of environmental leaders and laggards.” And French public opinion and public policy has been among the most hostile in Europe to GMOs.52

In 1999, the Green Party was represented in four European governments: Germany, where it has historically been strong, and France, Italy and Belgium, where it previously was not. All told the party had nearly 150 members in 11 of the EU’s 15 national legislatures.53 While the party is no longer a member of the governing coalition in either Italy or France, national policy makers in both countries have continued to support and adopt a range of relatively risk averse regulations. In sum, while substantial national differences in regulatory priorities persist within the EU, political support for more stringent protective regulations has become more widespread in Europe. When viewed in a broader historical perspective, the increasing importance of regulatory politics within much of Europe reflects a decline in the importance of class based politics, suggesting that European politics are becoming increasingly post-industrial.

**The European Union: Structural Developments**

In addition to a series of regulatory failures and related broadening and deepening of political support for more stringent regulatory polices within Europe, the emergence of the EU as a more important source of regulatory policy-making has also affected the stringency and scope of European regulatory policies. Institutional changes in European regulatory governance are both a cause and effect of changes in European regulatory policies. Significantly, the changes in European regulatory policies and politics described in this essay began around the time of the enactment of the Single European Act (SEA) in 1987. This amendment to the Treaty of Rome enabled directives to be enacted by a system of qualified
majority voting instead of unanimity. This significantly increased the EU’s ability to harmonize regulations. The EU has played a critical role in changing the dynamics of European regulatory policies: each subsequent revision of the Treaty of Rome has accorded civic interests greater weight in the policy process. Combined with growing public support for risk averse policies, these institutional changes have increased the influence of civic interests within the governance of the EU.

The SEA gave environmental policy a treaty basis for the first time, specifying that preventive action should be taken whenever possible and requiring that harmonized standards take as a base “a high level of protection.” The Treaty on the European Union (1993) made precaution a guiding principle of EU environmental policy: “Community policy shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken . . . ”54 The Treaty of Amsterdam (1997) called upon the Council and the Parliament to achieve high levels of health, safety, environmental and consumer protection in promulgating single market legislation and Article 153 explicitly defined consumer policy and health protection as “rights.” It also extended the precautionary principle to consumer protection.

As Majone has noted, the EU is primarily a regulatory state: issuing rules is its most important vehicle for shaping public policy in Europe.55 Notwithstanding frequent criticisms of the EU’s “democratic deficit,” its institutions have played an important role in strengthening the representation of civic or diffused interests. While in general consumer and environmental pressure groups have more limited influence on the Commission than do representatives of business. There however some notable exceptions.56 The European
Consumers Union led a successful campaign calling for the EU beef hormone ban, while Greenpeace effectively worked with Green Parties and other interest groups to mobilize public and political opposition against the approval of GMOs in Europe. In addition, the “European Court of Justice has often played a crucial role in promoting civic interests” and has been repeatedly willing “to be influenced by consumer and civic concerns in reaching its judgments.”

EU treaties have also steadily expanded the role of the European Parliament, a body in which consumer and environmental interests have been relatively influential, in shaping European legislation. The SEA granted Parliament legislative power under “cooperation” procedures, and these were expanded by the Maastricht Treaty which established “co-decision” procedures, thus giving the Parliament and the Council of Ministers co-responsibility for writing legislation. The Parliament’s purview over environmental legislation was expanded by the Amsterdam Treaty. “Despite the limitations of co-decision, its use as the legislative procedure for environmental measures considerably strengthens the Parliament’s role in the adoption of new environmental legislation.” The Green Party has been an important political presence in the European Parliament since 1989, when it captured thirty-seven seats; following the June 1999 election it had thirty seven members. The Parliament has often been an effective source of pressure on the Council for the adoption of more stringent regulations.

The EU’s decision-making structure has also magnified the influence of the “greener” member states. As Heritier argues, an important key to understanding the dynamics of EU policy-making lies in the logic of diversity, “which initiates a spontaneous acceleration of policy-making by regulatory competition and mutual learning.” Formally, EU policy is
highly centralized: directives are approved in Brussels and then the Member States are obligated to transpose them into national law and then enforce them. But in fact EU policy-making is highly fragmented. If supporters of more stringent regulatory standards can persuade decision-makers in one or more Member States that their ideas have merit, “these policy-makers will carry this point of view into the EU process.” Accordingly, “the significant participation of the member states means that the various ideas that circulate at the national level may in turn diffuse into the EU level.” This is also the case when Member States unilaterally enact more stringent regulatory standards – a dynamic that has often contributed to a “trend toward higher and tougher standards by Brussels.”

The EU’s quasi-federal structure, along with the fragmentation of authority among the Commission, the Council, the European Parliament and the ECJ has provided representatives of civic interests with multiple points of access. An entrepreneurial coalition favouring more stringent regulatory standards “needs ready access to only one part of the EU system (as long as that structural position provides a visible and vocal platform for the coalition’s cause.) Because EU institutions encompass such a wide array of interests, finding one sympathetic access point is relatively easy.” Obviously, a fragmented political system also provides opponents of policy change with multiple veto points. The EU’s constitutional structure does not automatically privilege civic interests any more than does the fragmented American system. But, as the American experience of the 1970s illustrates, the multiple points of access offered by a fragmented political system, when combined with a highly mobilized public, can lead to a significantly strengthening and broadening of regulatory standards.
Finally, the strengthening of regulatory standards at the European level has also been affected by the dynamics of the single market. An important consequence of the single market has been to make European consumers increasingly dependent on, and thus vulnerable to, the regulatory policies of all fifteen Member States as well as Brussels. This has increased political pressures on the EU to promulgate stricter European-wide rules since regulatory failure in any Member State endangers the single market as a whole. For Europeans, Brussels represents an important response to policy failures at the national level. In addition, protecting the health and safety of Europeans as well as the European environment has become critical to the EU’s legitimacy and its claim to represent the broader interests and concerns of Europeans. As Breyer and Heyvaert suggest,

[Regulatory] Centralization may be the expression of a growing feeling of unity among the citizens of Europe, of a growing desire to protect the common European heritage across national boundaries, and of a rising expectation among Europeans that, when they move from one country to another, they will benefit from the same high level of health and environmental protection. 65

Moreover, the European business community has a strong stake in harmonized standards in order to capture the efficiencies of the single market. Accordingly, there is often a convergence of interest between representatives of civic interests and business at the European level; the latter may not want more stringent European standards, but they typically prefer a harmonized standard to fifteen different ones.

THE EUROPEAN PRESENT AND THE AMERICAN PAST

There are a number of similarities between regulatory policies and politics in Europe since around and those in the US during the 1970s and 80s. During these those decades, an
influential segment of American elite and public opinion became more risk-averse, often focusing on the dangers of new technologies rather than their potential benefits. One British journalist wrote in 1971: “We saw the Americans thrashing around from one pollution scare to the next, and we were mildly amused. One moment it was cyclamates, mercury the next, then ozone, lead, cadmium – over there they seemed set on working their way in a random manner through the whole periodic table.” A British social scientist observed in 1979, “Americans seem to have taken an excessively strict interpretation of risk, reducing ‘reasonable risk’ practically to ‘zero risk.’” Douglas and Wildavsky wrote in Risk and Culture published in 1982:

> Try to read a newspaper or news magazine . . . ; on any day some alarm bells will be ringing. What are Americans afraid of? Nothing much, really except the food they eat, the water they drink, the air they breathe . . . . In the amazingly short space of fifteen to twenty years, confidence about the physical world has turned into doubt. Once the source of safety, science and technology has become the source of risk.

The argument in the US against public funding of a supersonic passenger airplane is similar to that made by many Europeans against granting regulatory approval for GM agricultural products nearly a quarter-century later: in both cases, a significant segment of the public saw no benefits associated with the proposed new technology, only increased environmental and health risks. The political salience of ozone depletion in the US during the 1970s parallels the high level of European concern over global climate change during the 1990s. The political setbacks experienced by the American chemical and automotive
industries during the 1970s and 1980s are similar to those experienced by agricultural biotechnology firms in Europe since the late 1990s.

The United States, like Europe, also experienced a series of widely publicized regulatory failures, or credible reports of regulatory failures, whose cumulative effect was to increase public support for more effective and stringent regulation. The thalidomide scandal (1962), Rachael Carson’s *Silent Spring* (1962), Ralph Nader’s *Unsafe at Any Speed* (1965), Love Canal (1977) and Three Mile Island (1979) were the American counterparts to Europe’s Chernobyl, the contamination of the Rhine, mad-cow disease, dioxin in the food supply, and contaminated blood. The significant membership expansion and increased political influence of public interest lobbies in the United States during the 1970s and 1980s parallels the increased influence of representatives of civic interests, including Green Parties, in Europe beginning in the 1980s and accelerating during the 1990s. And the centralization of regulatory policy-making in Brussels parallels the federalization of regulatory policy-making in the US. On both sides of the Atlantic institutional changes also made regulatory policy-making more fragmented, which in turn strengthened the influence of pro-regulation constituencies and reduced the ability of business to dictate regulatory outcomes. Significantly, the fragmented constitutional structure of the EU, with its quasi- separation of powers and quasi-federal division of regulatory responsibilities more closely resembles the US than it does any Member State.

**WHAT HAPPENED IN AMERICA?**

This raises a critical question: what happened to American regulatory politics and policies after 1990? After all, EU regulations could have become more stringent and comprehensive while the US also continued to enact relatively stringent and comprehensive
regulations, thus producing policy convergence. Or each could have adopted more stringent and innovative policies in different areas, with the result that on balance, the consumer and environmental standards adopted since around 1990 would have been no more or less stringent or innovative on either side of the Atlantic. But neither scenario has occurred. Why?

Before addressing this question, it is important to note that few of the relatively stringent and comprehensive statues enacted in the US through 1990 have been repealed. Indeed, some highly risk averse regulations continue to be issued pursuant to these laws including, for example, the 1997 ambient air standards for ozone and particulates promulgated by the Clinton Administration and the arsenic in drinking water standards (reluctantly) adopted by the Bush Administration. What has changed is the rate at which significant new regulatory laws have been approved. The last major legislative expansion of environmental regulation in the US took place in 1990; not since the emergence of the modern consumer and environmental movement in the 1960s has Congress gone so long without enacting a significant new regulatory stature.70

It is thus primarily with respect to consumer and environmental issues that have emerged since around 1990 that America has become a regulatory laggard. Here the contrast with the EU is particularly striking. It is not that federal standards regarding eco-labelling, packaging wastes, automobile and electronic recycling, the use of heavy metals in electronic equipment and carbon emissions are less stringent than those of the EU; in each of these critical policy areas American federal regulation is non-existent. And in the case of GMOs, European standards are notably more stringent than in the US. Why then did the American hare start moving like a tortoise after around 1990?
It is not that the American structure of regulatory policy-making has changed. The legal and administrative reforms that opened up the American regulatory process during the 1970s, namely enhanced Congressional oversight, increased opportunities for non-business interests to participate in administrative rule-making, and more extensive judicial review – including the granting of standing to representatives of civic interests - remain in place. Rather, the slowdown in the rate of new regulatory policy initiatives in the US since the early 1990s has to do with politics.

One critical difference between Europe and the US is the relative absence of major regulatory failures in the latter. (The last major regulatory failure in the US was the 1989 Exxon Valdez Oil Spill, which affected only a narrow range of policies). There have been periodic consumer safety and environmental crises since then, but unlike in Europe their policy impact has been limited. In sharp contrast to the 1970s and 80s, when high levels of public anxiety frequently impacted public policy – recall, for example, the critical role “Love Canal” played in prompting Congressional passage of Superfund, or of the successful media campaign of the Natural Resources Defence Council to ban Alar – more recent allegations of harm have had much less political resonance.71 A notable example is genetically modified foods and crops. Notwithstanding periodic intense media coverage of their possible threat to public health or the environment, policy-makers have imposed few additional restrictions and public concern has been episodic rather than sustained.72 Similarly, while the book Our Stolen Future provoked intense public concern about a decline in sperm counts caused by endocrine disrupters, no changes in regulatory policies resulted and the issue subsequently disappeared from the political agenda.73
These examples suggest that American attitudes toward risk and regulation have changed. In contrast to the 1970 and 80s, during the 1990s Americans were more likely to view technological innovation as a source of progress and wealth-creation rather than increased risk. They also became more sceptical of claims by activists that particular business activities threatened their welfare. Public opinion polls also reveal an increase in public satisfaction with the accomplishments of nation’s environmental policies, even though these policies have changed relatively little. For example, between 1993 and 1999, the portion of Americans who “say they are generally satisfied with the state of environmental protection in the U.S. “ increased from less than half to two-thirds. Likewise the percentage of Americans who worried “a great deal” about air pollution declined from 64% in 1989 to 42% in 1997. Equally importantly, Americans are now more trusting of government regulation than Europeans. Thus while 90 % of Americans believe the USDA’s statements on biotechnology, only 12% of Europeans trust their national regulators. Finally, according to one polling firm, America’s faith in major corporations rose in the 1980s and 1990s, helping to “produce a politics that has been reluctant to impose new regulatory burdens on business that might diminish corporate profits.”

These changes in public attitudes have changed the incentives of politicians. Democratic politicians, who have traditionally been the strongest supporters of more stringent regulations, have perceived less political advantage in advocating the expansion or strengthening of regulatory controls. Significantly, the 103rd Congress (1993 – 1995), with a Democratic majority and a Democratic president, produced, according to one analyst, “the worst environmental record in 25 years.” Throughout the eight years of his presidency, Bill Clinton invested little political capital in expanding the scope of regulation; he gave fewer
speeches on the environment than any president since John Kennedy, saving his most important environmental policy initiative – a significant expansion of western lands on which development was restricted- to the closing weeks of his Presidency. While Clinton announced his strong support of the Kyoto Protocol, he never submitted it to Congress. Nor did he seek to mobilize public support for legislation to reduce greenhouse gases. For his part, vice-president Albert Gore, not withstanding his reputation as a strong support of environmentalism, failed to focus on environmental issues either while in office or during his 2000 presidential campaign. Not surprisingly, the Clinton-Gore Administration’s environmental record proved severely disappointing to the American environmental community.

While the initial expansion of environmental regulation during the late 1960 and early 1970s reflected a bi-partisan consensus, differences in the environmental policies of the Republican and Democratic parties subsequently increased, with Congressional Republicans more opposed to environmental policy initiatives than Democratic legislators. However, President Reagan paid a political price for his initial efforts to weaken environmental enforcement and spent much of the remainder of his presidency trying to overcome his anti-green reputation by not opposing Democratic regulatory initiatives. Significantly, in 1988, Republican presidential candidate George HW Bush ran on a campaign promising to be a “Republican president in the Teddy Roosevelt tradition, a conservationist. An environmentalist,” in order to distinguish his record from Reagan’s. And he delivered on this promise by securing Congressional passage of the Clean Air Act Amendments of 1990, breaking a 13 year deadlock over this critical dimension of environmental regulation.
Five years latter, during the mid 1990s, the newly elective Republican majority in Congress made a determined and largely unsuccessful effort to weaken the nation’s environmental laws. This effort was strongly and effectively challenged by the environmental community and the party paid an electoral price in the 1996 Congressional elections. But in marked contrast to the 1980s, the Republican Party did not seek to become “greener” by supporting additional environmental regulation; rather it moved closer to the center by abandoning its efforts at regulatory “reform.”

In sum, around 1990 the preferences of the median voter changed. In contrast to the 1970s and 80s, when this voter often supported regulatory expansion, since around 1990 the median voter has been more likely to favor the regulatory status quo. He may consider himself a strong environmentalist, but this commitment is broad rather than deep. Specifically, while she opposes the weakening of regulation, she is also unenthusiastic about proposals to strengthen or expand it. Hence the political deadlock that has characterized American regulatory policy since the early 1990s.

CONCLUSION

The policy preferences of Europeans and Americans have diverged. While the number and significance of politically unacceptable risks has increased in Europe, it has stabilized or decreased in the US. As a result of a crisis facing European regulatory institutions, regulatory officials and politicians increased opportunities for public participation and become more responsive to public pressures and perceptions. Hence the adoption of the precautionary principle and the increasing willingness to enact relatively risk averse regulations. By contrast, the diminution of a regulatory failure cycle in American has
been associated with the increased legitimacy of the American regulatory institutions. This in turn has made regulatory decision-making more technocratic, less responsive to short-term public pressures and anxieties and frequently less risk averse. To use Ulrich Beck’s influential formulation, while Europe has become more of “risk society;” – one in which citizens perceive themselves to be faced with an endless series of unintended risks generated by advances in technology - America has become less of one. \(^5\) Wildavsky and Douglas’s previously quoted depiction of America in the early 1980s now more accurately describes Europe than the US.

We are now in a better position to generalize about the dynamics of regulatory policymaking on both sides of the Atlantic. Consumer and environmental regulations are likely to become more innovative, comprehensive and risk averse as a response to a widespread public perceptions of regulatory failures. Such a cycle of regulatory failures have a spill-over effect: they both make public opinion more sensitive to the risks associated with new technologies and undermine public confidence in existing regulatory institutions. Each new demonstrated failure makes allegations of future harms more credible. They also increase the demands for political access of constituencies who favour more stringent regulatory policies, and often increase their influence at the expense of business. Institutional changes in the policy process are both caused by and contribute to shifts in regulatory policy

The American experience suggests that this policy dynamic can persist for an extended period of time. It persisted for more than two decades in the US and the momentum for increased regulatory stringency in Europe has now lasted nearly fifteen years. It, however, does not last indefinitely. As new procedures for making regulatory policies are established and appear to be functioning reasonably effectively, the political salience of
consumer and environmental regulation declines and public pressures for more stringent standards diminish. At the same time, the influence of industry on regulatory policy-making again increases as policy-makers become more sensitive to the costs of relatively stringent standards. As long as the institutional changes that made policy-making more open and publicly accessible remain in place, the result is not so much a rolling back of existing consumer or environmental regulations, but rather policy gridlock. This took place in the US after 1990 and will at some point occur in Europe as well. Even hares cannot keep running forever.


2 Jasanoff, “American Exceptionalism, p. 63, 66


4 Breyer and Heyvart make a similar point in a more recent comparison of American and European institutions for managing risk.

5 Communication from the Commission on the precautionary principle, Feb 2, 2000, p 15.

6 Cameron, “The Precautionary Principle,” p. 244.


9 Jordan and O’Riordan, ”The Precautionary Principle,” p.61.


12 ibid, p. 48.

13 ibid

14 ibid p. 47.

15 ibid, p. 37.


19 ibid, p. 25.

20 The data in this paragraph is summarized in David Vogel, “When Consumer Oppose Consumer Protection,”


23 Quoted in Vogel, Trading Up, p. 158.

24 quoted in ibid, p. 172.


32 See David Vogel, Barriers or Benefits pp. 46 – 52.


For a detailed discussion of each of these trade disputes see David Vogel, *Barriers or Benefits*


There is an extensive literature on this subject. See for example Scott Ratzan, ed. *The Mad Cow Crisis: Health and the Public Good* (New York: New York University Press, 1998)


The links are observed by journalists with titles such as “Mad Coke Disease,” John Lanchester, *The New York Times Magazine*, July 4, 1999. p 7-8.


See the other contributions in ibid.


The extensive literature on this issue includes Michel Setbon *Pouvoirs contre Sida* (Paris : Editions Du Seuil, 1993), Blandine Kriegel, *Le sang, la justice, la politique* (Paris: Plon, 1999), and Olivier Beaud, *Le sang contamine* (Paris :Behemoth 1999). It should be noted that many scholars believe the scandal has been
overblown and the prosecution of government officials for it was both ethically and legally problematic. But this point of view has not affected public perceptions.

48 For a discussion of the origins of French policies toward GMOs, see David Vogel and Olivier Cadot, “France, the United States and the Biotechnology Debate,” Brookings Institution January 2001


50 See Andersen and Liefferink eds, European Environmental Policy


54 Jordan and O’Riordan, ”The Precautionary Principle” p. 68 – 69.


ibid

Young and Wallace, Regulatory politics in the enlarging European Union  p. 9

Zito, Creating p. 192


Quoted in Vogel, National Styles, p. 182.


The changes in the US are explored in detail in Vogel, Fluctuating Fortunes Chapter V


Aaron Wildavsky, But Is It True? Cambridge; Harvard University Press, 1995

Kathleen Hart, Eating in the Dark New York: Pantheon Books, 2002


Sussman, et al American Politics p. 164


82 Sussman, American Politics p. 171

83 Matthews, op cit
