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Regulatory Politics and Policies in the United States and Europe: Why the Difference?

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## Regulatory Politics and Policies in the United States and Europe: Why the Difference?

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The following are notes addressing the question: Why such a different response to environmental reform in the United States and in Europe? Also included is chapter 1 from my book, which explains some of the key issues and distinctions at stake.

### ➤ **Relationship to Science:**

*US:* Americans have demonstrated a consistent belief in the possibility of obtaining a final answer, a rendering of an objective reality via the tools of science. This may have its roots in America's foundation as a religious country—far more Americans count themselves as church-going than Europeans. This suggests a belief in objectively determined standards for morals, behavior, etc, a mindset which feeds the notion that science can, with enough research, determine a final explanation.

*EU:* Europeans approach science with a far higher degree of skepticism. Science is understood to be subjective, and constantly evolving from one 'answer' to the next, not fixed. On the one hand this suggests a frank look at the uncomfortable irresolution of scientific inquiry: one question leads to another question, which leads to another, and so on. On the other, it suggests European unwillingness to accept so-called 'objective' truths, rather that conditions/behavior in life are determined by subjective factors such as social and economic class, the conditions of life. This skepticism toward science came to the fore, according to Ambassador Bruton (and many others) during the mad cow scandal, when Europeans came rapidly to believe that they were not receiving the full story from the 'scientists' assigned to explain the potential dangers from the afflicted cattle. The scandal coincided with the birth of many of the environmental initiatives we're seeing today, in which public demand for action based on sometimes incomplete scientific information has now become EU policy. (Bruton suggested also that some of Europeans skepticism about the objectivity of science may be based partly in the Nazi experience, when 'science' was put to grotesque ends).

Science is at the heart of the matter when it comes to environmental policy, providing an assessment of the risks to people and the environment from production practices. While the U.S. complains that the Europeans allow politics to influence their science, the European approach reflects a sense that it's the responsibility of politicians to make the decisions over the risks that are acceptable to society. Which brings us to...

### ➤ **Punitive vs. Preventative Regulatory Approach.**

*U.S.* Deeply imbedded notion in the United States that violators of basic environmental protections must provide financial compensation to the victims. The U.S. provides access to the courts to citizens for arguing their case of violations—to

their health, or to the health of the environment. This tort system dates back to the 18<sup>th</sup> century, when the principle of ‘punitive’ damages was established. Thus, Americans have the possibility to ‘punish’ environmental violators. This possibility (the obstacles to proving culpability is another question) acts as an argument, both in government and within business circles, against strong regulation. If found guilty, a company or individual could face potentially crippling, damages. Thus, the argument goes, these powerful legal disincentives make government regulatory action unnecessary. Justice is exercised after the damage has been done.

*EU:* The Europeans take a different approach: at the base of many of the latest initiatives is preventing damage before it happens. This is known as the precautionary principle—which the EU has enshrined as being at the base of many of its environmental initiatives. The principle holds that an accumulation of evidence suggests harm, even in the face of uncertainty the government must act to prevent the harm from happening. Europe has nowhere near the level of court access or level of punitive damages that exist in the United States. Regulation is the check on business and individual behavior—to prevent damage before it happens, rather than punish those later after the damage has already occurred.

This is a critical distinction in the evolving divergence in US and EU approach to environmental regulation: I asked company officials in Brussels why they would not support new environmental regulations back home in the US that they were already abiding by in Europe, and the response, repeated in numerous ways in one form or another: Because in U.S. you have the tort system, that acts as enough disincentive to improper corporate behavior.

➤ **The Lobbying:**

*U.S.:* In fact, many of the early initiatives by the United States around environmental policy were based on precautionary principles. Precaution presumes that a decision is taken somewhere along the continuum of evidence, a subjective judgment as to when the evidence is substantial enough to prompt government action. The principle has by no means been foreign to U.S. regulators. U.S. efforts to regulate chemicals, via TSCA, or pesticides, via FIFRA, took a substantially precautionary approach, as did the establishment of a cap-and-trade system established in 1989 to regulate acid rain. But it was a systematic effort by the affected industries which led to a rollback of those principles, a process which began in the 1980’s during the Reagan administration, which initiated a string of deregulatory initiatives that have continued, in one form or another, to this day. Critical to this process has been the access of industry to rule-makers: either in Congress, through campaign contributions and lobbying or directly, in the rule-making bodies of the regulatory agencies. The result has been a rewriting of the rules, in which regulations now must meet extremely high standards of scientific certainty (an elusive concept according to many scientists) and withstand cost-benefit assessments in the Office of Management & Budget which weigh the ‘costs’ to industry of regulatory reform against the ‘benefits’ to society. Environmental progress in the U.S. has been slowed and in many instances reversed by the restraints imposed by these rules.

*EU:* The EU is certainly subject to its own fierce lobbying, but it is of a different nature. Campaign contributions are not permitted, removing a powerful lever of the

industry over government in the U.S. There are other channels for lobbying by industry in Europe, but those channels are also open to ngo's, which often offer a contradictory perspective. Many European ngo's are actually financed by the EU to help ensure the survival of what is seen as a voice of citizens to be considered in parallel with the voice of business. The balance of industry and citizen access to government policy-makers is quite different in the EU and US—a phenomenon which is reflected in the different approaches to environmental policy. And the willingness to accept scientific uncertainty permits government to act on accumulations of evidence and to resist U.S.-style calls for 'objective' science. The question of benefits and costs is also assessed differently, which brings us to....

➤ **Relationship to Nature.**

*US:* The 'environment' is 'over there', in some distant locale where environmental damage is done. At the root of this perspective is Americans belief in the endless frontier—the foundation of American settlement.

*EU:* In far more densely populated Europe the 'environment' is something with which Europeans contend daily. There is no wilderness left (except in a few select regions) where environmental damage can play itself out far from people's daily lives.

This distinction ultimately has considerable significance in the different regulatory approaches to 'cost'. In Europe, there is a more acute sense of externalized costs—those costs, to human health and the environment, which in the United States are borne by society at large. This sensibility informs some of the EU's major environmental initiatives, which attempt to shift the burden of those costs—in health care, clean-up, toxic remediation-- from society onto producers. In other words, the EU's environmental initiatives are aiming to internalize costs among producers—by mandating the development of less toxic substitutes, recyclable components, etc—that in the United States are externalized onto society, i.e. taxpayers.

Which brings us to the central issue that lies at the core of the European approach: government funded health care. The fact that government pays for health care in Europe offers a powerful economic incentive to attend to the long-term health consequences from current modes of production—toxic chemicals, greenhouse gas emissions, environmentally abusive production. In the U.S., individual health care costs are borne by individuals. This economic component cannot be underestimated—the European initiatives were fiercely lobbied, by industry and citizen groups alike, but the economic cost argument, the argument that the governments could end up paying significant costs for health care in the future meant that there was far more willingness to accept the precautionary arguments of environmental health advocates than has been the case in the U.S.

**Regulation & Innovation:**

*US:* The United States, I'm sure I'm not the first to point out, has a government which in a profound sense was created by the people who settled here. Going back

200+ years, structures for governing society and business were created to respond to the needs of a rapidly growing nation. To paraphrase American history: This country was settled and created by individuals, and a governing structure was developed to reflect that. It is restraints on the power of government that are one of the foremost features of the founding documents. The resistance to expanding government authority is imbedded in the U.S. experience: Rule-makers must demonstrate the legitimacy of rule-making first, such principles are not imbedded in the creation of the state itself. This strikes at the differing perceptions between US and EU at the relationship between regulation and innovation.

*EU:* Europe, as I'm also sure I'm not the first to point out, was created by monarchs, who created principles of top-down government dating back a thousand or more years—and subject, needless to say, to reform over time via the Magna Carta and other not insignificant political initiatives. Government's rule-making capacities have inherent legitimacy. Today, the EU is itself the product of those governments. Its expanding mandate is in the process of being accepted by a growing number of Europeans (a tumultuous process, but peaceful and moving toward rising legitimacy of European institutions). The notion that government can mandate rules is seen not necessarily as an intrusion into the sovereign life of the individual or corporation, but as one of the essential functions of governments. (To which extent and in whose interests of course differing dramatically between Socialists, Christian Democrats, Greens, et al).

When it comes to regulation, the Europeans argue that it helps prompt innovation in the marketplace by establishing a new level playing field demanding safer alternative production; the U.S. argues that it is impinging on companies' ability to devise their own solutions in response to market forces. Data is beginning to emerge from Europe suggesting that the EU's environmental initiatives have in fact spurred considerable innovation, amounting to hundreds of millions of dollars in new investments and jobs.