

A more Sophisticated Understanding of the Politics of Precaution

David Vogel*

I appreciate the very thoughtful reviews and commentaries on both my book¹ and on Jonathan Wiener's edited volume². Each essay raises a number of points which I will address in turn.

Susan Rose-Ackerman's essay focuses on the need to analyze the broader policy and legal significance of the precautionary principle and in particular its specific relationship to the European legal doctrine of proportionality and the application of cost-benefit analysis in the United States.³ The relationship between proportionality and precaution in European policymaking does deserve to be explored in greater depth. I agree that while both occupy an equally prominent place in European law, in fact there is a fundamental tension between the two. She outlines some of the important differences between the doctrines of proportionality and cost-benefit analysis on one hand and the application of the precautionary principle on the other, insightfully concluding that their normative policy implications differ substantially.⁴

In writing my book, I wrestled with the challenge of assessing the significance of the European Commission's various 'Better Regulation' initiatives. These initiatives appeared to challenge the policy

impact of the precautionary principle which my research found to be a defining feature of European risk management policy and which sharply distinguished recent European and American approaches to risk regulation. I concluded that while the American policy tools of cost-benefit analyses and regulatory impact assessment were enjoying increasing currency in Europe, to date they appeared to have had little impact on the actual regulatory policies adopted by the EU. Rose-Ackerman suggests a reason for this: their application would effectively challenge the EU's precautionary bias toward risk aversion.⁵

Adam Burgess⁶ notes that much of the differences in the conclusions of Jonathan Wiener and myself stem from the marked differences in our sampling: his study is much broader in scope. Both Wiener and I agree that with respect to some risk regulations, Europe has become more precautionary or risk averse than the United States. For other risk regulations, the United States remains or has become more stringent than the European Union. Still other regulations display increased policy convergence. Where we differ is the relative importance of the cases that fall into each of these categories. Wiener and his co-authors treat all his cases as roughly equivalent in importance, while I argue that the policy domains in which Europe has become more precautionary since 1990 are much more significant than those in which it is has not.

I appreciate Burgess' kind comment that 'Vogel has done a great service by sticking his neck out with such a bold thesis over a prolonged period.'⁷ While working on the book, I was certainly aware of the risk I was taking – if I may use that term – in making a series of broad generalizations on the basis of limited or at least not scientifically validated data to support them. I am pleased that he has found my analysis to be 'stimulating.'

Burgess also suggests that in seeking to understand the embrace of precaution by the EU's bureaucracy, I do not pay sufficient attention to the 'European political identity game.'⁸ He argues that the expansion of European consumer and environ-

* Professor at the Haas School of Business and in the Department of Political Science at the University of California, Berkeley.

1 David Vogel, *The Politics of Precaution: Regulating Health, Safety and Environmental Risks in Europe and the United States* (Princeton: Princeton University Press, 2012).

2 Jonathan B. Wiener, Michael D. Rogers, James K. Hammitt, and Peter H. Sand (eds), *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe* (Washington, D.C. and London: RFF Press/Earthscan/Routledge, 2011).

3 Susan Rose-Ackerman, "Precaution, Proportionality, and Cost/Benefit Analysis: False Analogies", *European Journal of Risk Regulation* (2013), this issue.

4 *Ibid.*

5 *Ibid.*

6 Adam Burgess, "Missing the Wood for the Trees", *European Journal of Risk Regulation* (2013), this issue.

7 *Ibid.*

8 *Ibid.*

mental regulation has been critical to the efforts of the EU to create a distinctive European identity and to increase its power over the member states.⁹ I agree that the strengthening of risk regulation by the EU has played a critical role in furthering the legitimacy of the European project. But I would add that there were many other ways in which the EU's bureaucracy could have strengthened its authority over the member states – including, for example, by forcing them to *reduce* the stringency of their national regulations. While I would not discount the role of bureaucratic self-interest in shaping European regulatory policy, I also believe the growth of precautionary regulations reflects a high degree of risk aversion on the part of much of the European public.

The ‘ridiculous’ issue of cell phone radiation that Burgess cites is a revealing one.¹⁰

While in principle the application of the precautionary principle and the self-projection of European bureaucracy as ‘guardians and protectors of their citizen’s safety’ should have led the Commission or the Parliament to recommend imposing restrictions on cell phones, in fact they have not done so. The reason is a simple one: Europeans like to use cell phones and would be strongly opposed to any proposals that would make it more difficult for them to do so – whether coming from their national governments or from Brussels. This example of ‘non-regulation’ suggests to me that the broad thrust of European risk regulations have been roughly consistent with the policy preferences of many Europeans – notwithstanding the EU’s oft cited democratic deficit.

While Burgess applauds my insight that the American style of regulation developed beginning in the 1960s has turned out to be ‘historically contingent’ as evidenced by the fact that it has since ended, he then goes on to suggest that the more recent period of business dominance and reduced politicization represents a return to the ‘normal’ pattern of American regulatory policymaking.¹¹ Here I strongly disagree. I do not think either period is more ‘normal’ or typical. During the 20th century, the United States experienced three major reform periods – the Progressive Era, the New Deal, and the more recent one that I discuss in *The Politics of Precaution*. Each significantly expanded the role and authority of the state at the expense of business.

(As an aside, I do not agree that ‘contemporary European precaution tends to be more *politicized* than its American forbearers.’¹² Such a claim rests on serious misreading of the politics of American

consumer and environmental regulations between roughly 1960 and 1990, which were highly contentious).

There is, in principle, no reason why another major reform movement could not emerge sometime during the 21st century. To be sure, this now looks rather unlikely in light of the strong opposition of nationally elected Republican politicians to any expansion of government controls of business – indeed the Republican controlled House of Representatives has voted nearly 200 times to roll back existing clean air and water standards. But the national political pendulum could well swing back in favor of strong Democratic majorities, and this in turn could both reflect and reinforce increased public pressures for more stringent regulatory standards. In short, there is nothing permanent about the contemporary partisan stalemate that characterizes American regulatory policymaking. It could easily again become highly politicized and more precautionary.

Nor do I agree that the EU’s ‘single issue politics’ described by Majone will necessarily persist.¹³ The fact that the EU is unlikely to emulate the American ‘evidence based approach’ to risk assessment and management is not necessarily decisive. As I suggest in my book, legal approaches to rule making are only one factor that shapes a political regime’s approach to risk regulation. Politics also matters: in the case of the EU this means the balance of power within the Commission, the Council and the Parliament. Each of the latter’s preferences for more stringent regulatory standards could well weaken. In fact, this has already occurred and, as a result the rate of growth of European risk regulation has declined. It is also unlikely that in the foreseeable future we will witness any major strengthening of European health, safety, and environmental standards – certainly not of the scale of REACH, RoHS, or WEEE – all approved nearly a decade ago.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

13 Giandomenico Majone, “Political Institutions and the Principle of Precaution”, in Jonathan B. Wiener, Michael D. Rogers, James K. Hammitt, and Peter H. Sand (eds), *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe* (Washington, D.C. and London: RFF Press/Earthscan/Routledge, 2011), pp. 411–433.

Thus I do not share either Burgess or Majone's view that the EU is locked into a continued 'declaratory war between lobbying groups and industry'¹⁴, the result of which will be a continued dearth of 'common sense' regulations.¹⁵ But I hasten to add that reasonable people can and do disagree as to which regulations adopted by the EU fall into this category. Personally, I regard the EU's efforts to address the risks of global climate change as reflecting considerable 'common sense', and I can only wish the American federal government was as sensible.

I thank Jane Winn for recognizing the value and virtues of my methodology and scientific approach.¹⁶ But while I do disagree with the conclusions of Wiener et al., I do not share her skepticism about the value of a quantitative approach.¹⁷ I would welcome a more scientific test of my thesis, though any such test would need to both carefully specify the kinds of cases to be included and provide some assessment of the relative importance of each risk regulation measured. Neither of these criteria are met by the quantitative study published in *The Reality of Precaution*. Both Wiener and I agree that there are important exceptions to my 'flip-flop' hypotheses. What we disagree about is both the number and importance of these exceptions. A good quantitative study could help assess the validity of our respective positions.

Maria Weimer suggests that I erred in not regarding the growth in the regulatory authority of the EU as an independent stand-alone explanatory factor in explaining the increased stringency of European risk regulation beginning around 1990.¹⁸ Rather, as she notes, I viewed the growth of the EU's regulatory authority as a consequence of public pressures for more stringent regulations.¹⁹ This is an important

criticism. I certainly do not challenge the explanatory importance of the EU's increased regulatory competence, which I agree was primarily driven by business support for the single market program. But I would argue that the 'integrationist logic of the EU's internal market regulation' was a necessary but *not* sufficient condition for the growth in European regulatory stringency.

The single market project did not require that European regulatory standards be strengthened, only that they be harmonized. But they could just as easily have been harmonized by weakening them as by strengthening them. The fact that the EU often chose the latter was due, I would argue, to the 'intensity of the public's demand for regulation.'

I now turn to Bill Durodié's comments.²⁰ He criticizes me for regarding the growth of EU regulation as 'somehow encapsulating the will of the people' and 'pushed by popular demand.'²¹ He suggests that it makes more sense to understand this important political development as reflecting the role of unaccountable European elites who have manufactured or encouraged public demands on them.²²

But this raises the question: Why did those 'anonymous and unelected bureaucrats' choose to promote a precautionary approach to risk regulation? Could they not just as easily have used their authority to strengthen the single market by weakening national risk regulations? Durodié's analysis also overlooks the fact that most EU risk regulations have their origin in the policies adopted by one or more member states, whose policymakers *are* elected. Moreover, they also require the approval of the Council of Ministers, which is comprised of politicians chosen through democratic elections.

He asks rhetorically: 'Where are the mass movements demanding the banning of beef or the regulation of chemicals and cell phones?'²³ But this is rather demanding criteria by which to assess the legitimacy of public policy. Very few policies enacted by any government are a response to mass movements, but this does not mean that they lack public support or have not been responsive to public opinion. Moreover, in *The Politics of Precaution*, I specifically argue that public opinion is one of only three factors that explains the transatlantic shift in relative regulatory stringency. The two others are elite political preferences and the legal and administrative criteria for assessing and managing risks.

Let me now turn to Durodié's three examples of 'unaccountable' European regulations.²⁴ During the

14 Burgess, "Missing the Wood for the Trees", *supra* note 4.

15 Majone, "Political Institutions and the Principle of Precaution", *supra* note 11.

16 Jane K. Winn, "Precautionary Schemes", *European Journal of Risk Regulation* (2013), this issue.

17 *Ibid.*

18 Maria Weimer, "'It's the Politics, Stupid', Or is the Reality more Complex?", *European Journal of Risk Regulation* (2013), this issue.

19 *Ibid.*

20 Bill Durodié, "Precautionary Tales – Missing the Problem and Its Cause", *European Journal of Risk Regulation*, this issue.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

second half of the 1980s, there were strong public pressures from citizens in a number of member states to ban beef (hormones). Moreover, the ban was approved by the Council of Ministers, not EU bureaucrats. The effort to strengthen European chemical regulation was initiated by Sweden and strongly supported by several member states, as well as by significant segments of the European public. I do not think the latter's policy preferences were manipulated by the Commission. Rather many interested and informed Europeans quite reasonably believed that existing European chemical regulations needed to be reformed and strengthened. The five year intense political battle over the provisions of REACH, the EU's most important chemical regulation, strikes me as evidence of the strength of European political participation and the capacity of European institutions to promote informed policy deliberation. It did exhibit, to quote Durodie, 'the genuine engagement of the demos in political debate,' as well as the important role played by 'mediating' interest groups.²⁵ The regulation of cell phones is like the dog in the Sherlock Holmes story that did not bark. For reasons that I noted above, the EU has *not* restricted cell phones usage.

Finally, I want to fully agree with Weimer's insightful concluding comments.²⁶ The next challenge for scholars is to determine to what extent my generalizations and explanations also hold for other dimensions of risk regulation, in effect combining my historical/comparative approach with the broader scope of Wiener's volume. For example, does the regulation of financial risks follow a similar pattern to the one I identified for health, safety and environmental risks caused by business? What about the risks of communicable diseases, vaccines, medical errors, violations of data privacy, violent crime, firearms and natural disasters? The list of risks from which government may choose to protect their citizens is extremely large; indeed, it includes much of what modern governments do. It is important to know more about the patterns that underlie public policies toward different kinds of risks in Europe and the United States and to understand how and why they converge and/or diverge. This represents a promising 'new empirically oriented research agenda', which I hope other scholars will pursue.

²⁵ *Ibid.*

²⁶ Weimer, "It's the Politics, Stupid", *supra* note 16.