National regulation in a global economy: new governance approaches to 21st century work law

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1 Introduction

Laws governing employment relations have proliferated in the past few decades. With labor unions in decline, countries have increasingly turned to government regulation in a broad range of areas, including antidiscrimination, safety and health, employee privacy, wage and hour, speech rights, and leave and benefit laws. This chapter addresses government regulation of the labor market in the context of a global economy. While it is difficult to designate the boundaries of the topic, this chapter will aim to provide a broad overview of the challenges and promises of government regulation in the 21st century, with a particular emphasis on the need to maintain competitiveness in an era of globalization.

The chapter first considers the ‘race to the bottom’ analysis, which predicts that a nation will experience depressed compensation and downward pressures on its regulatory system if the system provides comparatively high protections. It identifies theoretical and empirical findings both supporting and refuting predictions of a race to the bottom and portrays a more complex picture of the effects of globalization on national regulation.

The chapter then describes the declining but continuing role of the state in the global economy. Mandatory labor market regulation is a common response to market failure. At the same time, traditional regulation is itself prone to a range of inefficiencies and failures. Given the continuing need for government intervention, the limits of traditional command-and-control regulation, and the growing pressures to liberalize markets, regulators around the world have developed increasingly innovative third-way approaches to regulation, often collectively referred to as the ‘new governance model’.

Globalization is compelling regulators to experiment with legal strategies outside the traditional command-and-control toolbox. New governance approaches to regulation involve a more active role for private companies and organizations. At the local, national and transnational levels, these private actors are involved in setting and enforcing standards while maintaining a significant coordination role for government.
regulators. New governance strategies have been employed through a variety of policies, including occupational health and safety regulation, antidiscrimination strategies and whistleblowing protections. Examples from various countries are discussed in this chapter.

2 Globalization and its effects on national regulation

Global trade has become both a necessity and a reality for national economies, creating heightened emphasis on flexibility and a reluctance to burden employers with mandatory requirements. Traditional economic analysis views regulatory requirements and generous welfare provisions as an impediment to global competitiveness by pushing up labor costs and taxes. According to this view, even when regulation is efficient, the mere imposition of regulatory requirements will push production elsewhere. Thus, states confronted with the liberalizing pressures of economic globalization will find it increasingly difficult to regulate. The analysis therefore understands economic liberalization and global integration as forces compelling lower or fewer national regulatory standards (Wallach and Sforza 1999; Donahue 1994). As capital and production move more freely around the globe, countries will engage in regulatory competition in order to retain investments and attract new ones.

Kerr et al. (1960) suggested decades ago that global market forces push national industrial relations, including legal systems, toward ‘convergence’, that is, legal systems become more similar to one another in an effort to attract investment and capital. More recently, Donahue (1994) described the world as becoming ‘a huge bazaar with nations peddling their workforces in competition against one another, offering the lowest price’. Kohler (2003) suggests that ‘[w]herever one looks, one sees the same thing: a steep and continuing drop-off in union-membership, a decline in collective bargaining and in European countries at least, mounting pressure to diminish the sorts of elaborate legal protections traditionally afforded to individual employees’. Similar to earlier debates about federalism and state competition, 21st century globalization pressures are often understood as leading to an inevitable ‘race to the bottom’ (Alber and Standing 2000). At the same time, however, an extensive literature depicts a far more complex picture. In many cases, economic integration has not undermined the role of national governments and their ability to regulate their markets.

Drezner (2000), Locke and Thelen (1995) and Wailes (1999) point out that significant differences continue to exist among states despite these pressures. Similarly, Bamber et al. (2004) and Kahler (1998) observe that there is little evidence for strong organizational and regulatory convergence among countries. Spar and Yoffie (2000) argue that a downward spiral that lowers standards of national regulation is most likely when the
following factors exist together: products or key inputs are homogeneous, cross-border differences are significant, and sunk and transaction costs are minimal. They believe that the existence of all these factors is rare, and so most of the time companies have neither the capacity nor the incentive to move elsewhere. In addition, international bodies, regional trade agreements and private standard-setting initiatives all contribute as well to forestalling a race to the bottom (Spar and Yoffie 2000; Krueger and Meyer 2002).

Along the same lines, Bernstein and Cashore (2000) offer a typology of four kinds of international pressure on national policies: market dependence, international rules, international normative discourse and infiltration of the domestic regulatory process. Bennett (1991) also finds four mechanisms of policy convergence that are distinct from the simple downward pressure of a race-to-the-bottom reduction of regulation. These include emulation, elite networking, harmonization through international regimes and penetrations through private external interests. These various analyses confirm that in order to study the dynamics of globalization on national regulation, there is a need to understand not only the economic dimensions of international trade but also the legal and social dimensions of globalization and transnationalism (Vogel and Kagan 2002).

Some commentators have argued that under certain conditions, globalization can in fact lead to the strengthening of regulatory standards. This is more akin to a ‘race to the top’ theory (Vogel and Kagan 2002; Hepple 2005). These commentators view more active government intervention and welfare provision in national markets as facilitating rather than impeding global competitiveness. In a related argument, Rieger and Leibfried (1995) predict that states with a weak safety net of welfare provisions will have a more difficult time restructuring and laying off workers in response to the demands of globalization. States with adequate welfare protection, on the other hand, will be able to eliminate inefficient industries more easily. Garrett (1998) similarly argues that more generous social safety standards strengthen the ability of countries to adjust rapidly to changing international market conditions. Bates et al. (1991) find that countries with greater public social insurance programs will be less likely to resist free trade markets.

Another set of arguments about the possibility of a global race to the top concerns the manner in which states cooperate to maintain or reduce their national regulatory regime. Vogel (1995) termed this practice ‘the California effect’, a process in which globalization can in fact strengthen regulatory standards by exporting higher standards and creating greater support by local companies of higher standards. This is usually limited to wealthier, highly regulated legal regimes that are better situated to comply
with these standards than their foreign competitors. Genschel and Plumper (1997) similarly argue that negotiations and cooperation among national regulators ‘can stop a deregulatory downward spiral and turn it into a race to the top’.

In the context of environmental standards, there are empirical findings of such a ‘California effect’ in the European Union (Golub 2000). Studying employment and labor standards in the EU, Gitterman (2002) finds some ‘harmonization up’ of regulation of labor and employment standards, but also considerable divergence between the member states. Coordination, integration and liberalization have pushed states to more efficient modes of regulation and some convergence on minimum standards (Gitterman 2002). In other words, while core features of each European country’s employment law regime remain nationally specific, there is some harmonization and ratcheting up of regulatory standards. It should be noted that some researchers find that product standards – such as the quality and safety of the consumed good – are more likely to experience a race-to-the-top effect than production standards – such as employment conditions at the factory (Golub 2000; Swire 1996; Scharpf 1998).

The European Community as a supranational entity with legislative, executive and judicial powers has dealt with the issue of harmonizing national laws. Because of the vast differences between the member states in terms of their economic development, industries, culture and social norms, the EU’s goal has been to establish minimum conditions through directives and guidelines (De Burca and Scott 2006). This strategy allows each member state to implement and conform to the supranational directives at a different pace and with various adjustments. In addition to the directives and the guidelines, the European Court of Justice (ECJ) plays a predominant role in overseeing the adoption of the European rules into national law (Weiss 2007).

Looking at the particular area of work and family regulatory protection in the context of European integration, Murray (2008) describes a significant trend towards more intervention in the labor market to help workers mitigate such conflicts. These changes are promoted by national governments as well as by international institutions, including the International Labour Organization (ILO) and the European Union. Early assessments of these interventions in the United Kingdom, Ireland and the Netherlands suggest that the new regulations have not led to a sharp increase in contested matters before industrial tribunals and the courts (Murray 2008). As with other fields of regulation, the context of work and family law shows that ‘much of this recent regulation is designed specifically to establish a legal framework of principles and processes within which implementation can occur at the workplace, through individual or collective bargaining’
In the broader context of gender equality policies, including antidiscrimination, sexual harassment, equal pay, as well as child care and family leave, Gelb (2000) finds that there has not been a race to the bottom; rather, globalization has frequently augmented state regulation in these areas.

In sum, the impact of globalization on national regulation remains heterogeneous. At times, national regulators must adjust to allow greater flexibility and more efficient competitive market production (Agell 1999). At the same time, regulators of less developed regimes must adjust their standards to incrementally present minimum conditions that fit the norms of the international community. The three trajectories – convergence to the lowest common denominator (race-to-the-bottom), persistence of national specificity of regulation or no race – are illustrated by Murphy (2004; see Figure 22.1). On the horizontal axis of Murphy’s figure is the commonality of regulation among national governments. On the vertical axis is the stringency of the regulations. By and large, the empirical evidence shows that globalization and market integration lead to neither a race to the bottom nor a race to the top. Rather, the impact on national regulation will vary considerably, causing regulatory regimes to remain heterogeneous despite some harmonization (Andersen et al. 2000).

Still, many have argued that, in general, the nation state is significantly less capable in today’s economy to govern and regulate markets (Beck 1992). In particular, developing countries have limited ability to regulate labor conditions, or perhaps they simply have limited interest in doing so. Labor standards in developing nations are generally lower than in

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Source: Murphy (2004).

Figure 22.1 Globalization and its possible regulatory effects
developed countries, and even minimal international standards are regularly not observed. Thus, it may be that a race to the bottom is most concerning for rapidly industrializing countries (Porter 1999). Globalization has meant that many large corporations from developed countries operate at a transnational or multinational level, whether through ownership of a foreign subsidiary or by subcontracting core functions of the firm, primarily those of production. While classic free trade theory suggests that open markets will lead to the maximization of global wealth as well as to the wealth of each trading nation, Gomory and Baumol (2000) challenge this assumption, arguing that in industrialized economies, the key to economic success and trade patterns is the ‘retainability’ of industry – the retention of industrial resources, including capital and jobs.

In addition to the international tools described in other chapters in this volume, including international agreements such as the North American Agreement on Labor Cooperation (NAALC), the various bodies of the EU and international bodies such as the ILO or the OECD, there have been limited attempts to pursue international standards through national courts (Compa 1993). In the United States, regulation of conduct outside the country’s borders has been limited. While Congress has the authority to pass statutes regulating extraterritorial conduct, the courts interpret statutes with a presumption against extraterritorial effect (Darby and Keller 2003). One of the few exceptions to Congress’s abstention from extraterritorial application of employment laws is in the area of discrimination. In 1991, the United States Supreme Court held that Title VII, which prohibits discrimination on the basis of race, color, national origin, religion and sex, does not extend to overseas activities (EEOC v. Arabian American Oil Co., 499 US 244 (1991)). Congress reacted by amending Title VII to protect US citizens working abroad for an American employer or a foreign corporation controlled by an American employer (Darby and Keller 2003). While this is an exception to the generally limited reach of national law, it is still very narrowly applied, as it only protects citizens working for American-owned companies. There have been some attempts to use the Alien Tort Claims Act (28 USC section 1350) to allege abusive labor standards abroad in American courts, but this Act remains largely dormant (Shamir 2004). In sum, extraterritorial application of US labor standards remains highly limited.

Finally, a related issue is the adequacy of national regulation in addressing the ever-changing risks and conditions of production and technological competition in a globalizing market. Increasingly, there has been a proven disconnect between compliance with substantive rules and the intended goals of regulation. Often, regulatory rules are too complex, vague, needlessly detailed or simply unsuited to fit the realities of globalized production
and work (McGarity and Shapiro 1993). In particular, as technology and production methods change rapidly, it is virtually impossible to address all the risks of production and work through universal standards (Braithwaite 1985; Bardach and Kagan 1982). For example, regulatory standards frequently diverge from the major sources of fatalities and injuries in the workplace (Mendeloff 1984).

Moreover, the nature of work itself has changed in various ways in response to globalization (Lobel 2003). As Chapters 21–24 in this volume describe, the adoption of more contingent, flexible, lean and outsourced employment is a major trend of today’s labor market. The move to higher technology production in some sectors, as well as the increase in the service sectors, has also presented new realities to employment relationships. Increased diversity in production and workforces, a shift from goods to services, and a decrease in the percentage of workers employed in stable full-time jobs all further exacerbate the challenges for national regulation. The heterogeneity of the workforce and the workplace has made it more difficult for a centralized government agency to promulgate rules that will fit all firms (Osterman et al. 2001). Rapid technological changes as well as unpredictable strains of heightened competition require flexibility and constant adaptation.

3 Market and non-market ordering of the employment relationship

In exploring regulatory responses to market failures, a first basic distinction is between mandatory and default rules. Mandatory rules are those which the regulated parties must follow. Default rules are those which control the relationship unless the sides have contracted otherwise. Traditional regulation, often referred to as ‘command-and-control regulation’, generally signifies mandatory rules. A simple economic analysis suggests that, absent a market failure, mandatory rules are likely to produce a downward shift in labor demand. The mandated rules will normally have a greater cost than their positive effect on the labor supply curve, thus reducing efficiency by reducing the number of jobs offered (Summers 1989). As discussed in the previous section, this is especially problematic in a globalized free trade economy, where capital flows freely to places with less mandatory labor regulations.

Nevertheless, market failures do systematically occur in the employment context. Market failures may be defined broadly to include imperfect information, information asymmetries, pervasive market imbalances, and various externalities. First, information deficiencies and asymmetries create imperfect decisions. For example, in the context of occupational safety and health, employees are often uninformed about the magnitude of risk they might face (Lambert 2004). Similarly, employees are frequently mistaken about the default rules that control the employment relationship (Kim 1997).
A different kind of deficiency concerns historical exclusions of some groups in the workforce. For example, lower participation rates in word-of-mouth networks may limit the information these groups receive about market opportunities. Related to information asymmetries are cognitive biases. Employees often have biases in judgment and decision-making, such as an optimism bias, where they significantly underestimate their chances of getting hurt on the job (Kuran and Sunstein 1999; Hertwig et al. 2005).

A third type of market failure relevant to the employment relationship is that of externalities. The costs of some employment risks not only are often experienced by the individual employee, but also affect third parties and the public at large. For example, if the employer fires employees who blow the whistle on environmental pollution, the costs of firing are borne not only by the fired employee but by the public as well, as future employees will be deterred from reporting this illegal behavior (Lobel forthcoming a). Similarly, if an employee is injured on the job, the costs are experienced not merely by the employee but also by the relevant public or private insurance systems.

A fourth type of market failure is lack of coordination. Regulation can serve as a way of providing vertical and horizontal coordination among market actors (Trebilcock and Howse 2005). For developing countries, government regulation may also serve a market startup function. Krugman (1995) argues that government can, through a ‘big push’ of investment, overcome coordination problems that hinder economic development. Finally, some labor market regulations are specifically meant to assist particular groups in overcoming discrimination, distributional inequities and other factors that present impediments to full and equal participation, such as the disparate work/family effects on gender (Becker 1971; Gersen 2007).

Thus, law and economics scholars recognize that under certain conditions, government interventions can in fact enhance both liberty and welfare (Amir and Lobel 2008). The economic understanding of market failures has broadened. More than that, the very concept of linear maximization of individual welfare through rational choice is problematized in new institutional and behavioral economics. Drawing on psychological analysis, behavioral law and economics has introduced the understanding that individual preferences are endogenous, a function of experience and existing collective norms (Ariely 2008). As a result, recent law and economics scholarship recognizes that freedom is not identical to unlimited choice and that some government intervention is inevitable in a functioning market (Thaler and Sunstein 2008).

As a response to various market failures and as part of the decline of labor unions as the primary mechanism of collectively ordering employment
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relations, many governments have recently increased legislation pertaining to employment. Employment regulation is often thought to refer to traditional command-and-control regulation, where legislation and agency regulation set standards that must be complied with by industry.

Traditionally, regulation consists of two phases – rulemaking and enforcement. First, the agency promulgates standards that address various risks and action requirements for companies. Second, the agency sends compliance officers to perform inspections of workplaces. If a violation is detected, compliance officers issue citations and impose fines on the employer. Civil claims also frequently follow, allowing employees to bring a private action against an employer who has violated a protective rule.

The context of occupational safety regulation illustrates both the need for regulation and the limits of government intervention. Workplace safety regulation is typically the paradigmatic example for a government response to market failures such as information failures and cognitive biases. As Chapter 8 describes more extensively, employees tend to be misinformed and to underestimate the risks presented at work, thereby oversupplying labor at market rates. Workplace injuries also have externality effects, as the costs of injury and disease are paid for by both the individual employee and the taxpayer paying for welfare and other social services. At the same time, the command-and-control approach to occupational health and safety regulation has been subject to much criticism.

Studying the US Occupational Safety and Health Administration (OSHA), Viscusi (1979, 1986) argued that because of low financial penalties, as well as low likelihood of inspection, OSHA regulation has little effect on the behavior of employers. Scholz and Gray (1990) and Weil (1996), however, found that large, frequently inspected firms were significantly affected by OSHA enforcement. A more recent study by Gray and Mendeloff (2005) finds that OSHA regulation had a significant effect on injury rates in the early 1990s, but this disappeared later on. As will be discussed further in the next section, OSHA’s limited success demonstrates the broader realities of pressures to move to more efficient regulation, particularly in light of the growing need to maintain global competitiveness.

More generally, regulatory failures have been at the center of legal study for several decades. Regulatory deficiencies are understood to include rigidity, monetary waste, a tendency to uniformity and the suppression of innovation (Breyer 1979; Dempsey 1989). Peter Schuck (2000) describes the symptoms of regulatory pathology as ‘stifled competition, gross inefficiency, hostility to public participation in agency processes, frustration of innovation, administrative chaos and delay, secrecy, absence of long-range planning, and indifference to competing social objectives’
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(Schuck 2000, p. 119). At the conception stage, regulation may be based on poor information and policy analyses that oversimplify the issue (Sunstein 1990). At the implementation and enforcement stages, interest group resistance and bureaucratic limits can defeat the goals of the regulatory efforts (Sunstein 1990). Government agencies often lack the resources to monitor implementation, let alone adequately determine cause and effect. They may also be susceptible to rent-seeking and capture, where powerful interest groups control and disproportionately affect regulatory decisions (Bratton and McCahery 1995).

Moreover, the impact of judicial review, private resistance and new legislative hurdles on issuing administrative rules have all burdened and ossified administrative rulemaking (Comprehensive Regulatory Reform Act of 1995; Jordan 2000; Marshaw 1996). As a result, regulation has been highly unbalanced, even within subfields, such that some risks are over-regulated while others remain unaddressed (Lobel 2005; Viscusi 1983). From a broader policy perspective, regulation further risks regressive taxation when the costs of regulation are passed on to consumers (Bratton and McCahery 1995). At the same time that regulatory rulemaking has presented a myriad of challenges, regulatory enforcement has similarly proven to have large limitations. Both administrative enforcement and individual litigation entail large costs. This has led some commentators to argue that the legalistic command-and-control method and highly litigious nature of American regulation has been costly, such that the EU may have been able to have overall higher regulatory standards without experiencing an equivalent escalation in production costs (Kagan and Axelrad 2000; Anderson and Kagan 2000).

Thus, a shift to more efficient approaches to regulation and enforcement can allow the maintenance of high standards with lower costs. Agencies such as OSHA traditionally enforced regulation through top-down, random and comprehensive inspections seeking violations of substantive rules in various worksites, followed by prosecution and sanctions. But enforcement has been challenged as counterproductive when firms become increasingly averse to working with the agency toward mutually beneficial results (Lobel 2005). Indeed, studies indicate that repeat inspections have only modest effects on compliance with OSHA standards (Weil 1992, 2001). Often, firms engage in merely temporary fixes rather than undergoing systemic sustainable changes in their risk management (Simon and Sparrow 1997). Civil litigation is also costly and often not suitable for implementing these reforms of the workplace (Bagenstos 2006). Given the understanding that overreliance on command-and-control regulation may, in fact, result in ineffective regulation and that top-down rules and adversarial enforcement often fail to achieve their intended goals (and, at
times, may be counterproductive in regulating private industry), policymakers seek more effective approaches to regulation (De Burca and Scott 2006).

4 New governance approaches to national regulation

In recent years, both in practice and in scholarly inquiry, a new approach to regulation has emerged, often referred to as ‘New Governance’. This vision of regulatory governance attempts to reconcile the tension between concerns about regulatory inefficiency by big government and the continuing need for a public response to social challenges. Politically, national governments, fraught with budgetary constraints and interest-based resistance, aim to benefit from regulatory cost-sharing with private organizations while enhancing the effectiveness of their regulatory activities. Looking at business regulation around the world, Braithwaite and Drahos (2000, p. 28) describe the recent ‘rise of a “new regulatory state”, where states do not so much run things as regulate them or monitor self-regulation’.


The term ‘new governance’ encompasses the myriad recent regulatory approaches designed to enhance industry cooperation and self-regulation (Lobel 2004a, p. 342; Lobel 2007b, p. 937). Instead of focusing on substantive prohibitions and adversarial enforcement, new governance approaches attempt to actively involve firms in the legal process, including the processes of interpreting and complying with legal norms. ‘Cooperation instead of adversarialism’ has thus become the motto of administrative agencies in the past decade, experimenting with shifts from
extensive elaboration of prohibitive standards and high rates of inspection to self-regulation programs of collaborative, semi-voluntary compliance (Lobel 2006c). Moreover, advocates of new governance view adversarial relations as potentially reducing the willingness of firms to share information and collaborate with the agency in mutually beneficial problem-solving. Government agencies are therefore encouraged to seek ways to foster a culture of compliance with regulated industries. To this end, agencies enlist private corporations to actively self-regulate by self-identifying problems and risks and formalizing possible solutions. In turn, the agency offers consultation and assistance, practical and reputational rewards through safe havens, flexibility and variance accommodation, and public certification of responsible practices.

In order to allow such continuous improvement through the self-monitoring of corporations, government regulations are frequently phrased as norms rather than rigid rules. In fact, regulations are often deliberately ambiguous and open to multiple interpretations. Instead of regulating the details of behavior, agencies increasingly use broad policy goals such as ‘risk management’ and allow the regulated industries to implement and interpret these mandates (Bamberger 2006).

A good example of the synergy between private standardization, monitoring efforts and government agencies is the use of information or disclosure regimes as policy tools which allow choice and participation (Pedersen 2001). In areas as diverse as securities regulation, banking and loan management, environmental safety, health care, pharmaceuticals, and consumer protection, the availability of information on performance, rates and quality is required by regulatory agencies for the use of interested stakeholders. This information is understood as a way to generate better practices.

For example, the European Union has formalized social and environmental reporting and disclosure obligations as a matter of corporate law (Kysar 2005). In the US, environmental information disclosure initiatives such as the federal Toxic Release Inventory Program (TRIP) require firms to report their environmentally related activities to the Environmental Protection Agency, which then posts the data on the internet for use by industries, consumers and non-governmental groups (Karkkainen 2004).

In other words, government provides incentives for self-implementation programs and encourages private participation by disseminating information to the public. Even when imposed by regional or national law in this manner, corporate social and environmental reporting still constitutes a significant departure from conventional command-and-control mechanisms. In a disclosure regime, the state mandates nothing beyond the provision of information to interested non-state actors who, in turn, are
encouraged to utilize the information in ways that will promote collectively desirable behavior.

Corporations have always been embedded in both legal and non-legal norms. The longstanding body of literature on social norms and private ordering as complementing regulatory norms has set the stage for the more recent scholarly interest in the potential of a range of approaches to regulation. For example, Ramseyer (1987) studied the role of non-legal norms in explaining the rarity of hostile takeover in Japan. Others have studied the role of social norms in enforcing trade secret protections and non-compete covenants in the American employment context (Feldman 2006; Hyde 2003).

In the past few decades, economists and legal scholars have broadened their inquiry by exploring the multiple roles of law in achieving social change and the relationship between government branches in realizing these changes. Sunstein (1996) explores the influences of the declaration of a formal rule on prevailing social norms. Rubin (1994) suggests the possibility of building upon and supporting privately generated norms by adopting them into legislation and jurisprudence.

New governance builds on these insights that law has an expressive value in addition to its direct control over individuals and corporations. The law offers principled reasons and justifications for action in addition to its direct tangible prohibitions and results (Anderson and Pildes 2000). This suggests that the existence of mandatory law can itself be norm generating. In other words, the regulatory regime creates a relational contract between government and industry that in turn supports the generation of private norms (McMaster and Sawkins 1996).

These developments in regulatory theory point to a new understanding that ‘state power is best understood as constituted by and helping to constitute webs of regulatory influences comprised of many actors wielding mechanisms’ (Braithwaite and Drahos 2000, p. 31). Principal actors include NGOs whose ‘influence has been greatest when it has captured the imagination of mass publics in powerful states’, such as with the anti-slavery, labor, women’s, and environmental movements (Braithwaite and Drahos 2000, p. 31). There has been a rise in new forms of non-state governance, such as accreditation and certification initiatives like the Fair Labor Association (Bartley 2003). In 1998, the Council on Economic Priorities, a US-based non-governmental organization, founded an accreditation agency for the auditable, continuous improvement of the SA8000 Social Accountability standard, which covers various fundamental labor standards.

In particular, in the informal sector where the worst labor abuses occur, states may have little control over their regulation, while large corporations retain leverage over their suppliers (Braithwaite and Drahos 2000).
Voluntary codes of companies such as Levi-Strauss, Wal-Mart, Dayton-Hudson and Reebok have been the result of media pressure and shareholder resolutions, including ethical investment and consumer fair trade campaigns (Clifford 1994; Compa and Hinchliffe-Darricarrere 1995). From this perspective, private norms such as corporate codes of conduct and non-governmental standards can serve as a benchmark for state codification and enforcement (Sabel et al. 2000; Gorgemans 2005). In 1996 the Clinton administration established a tripartite Apparel Task Force issuing a Workplace Code on Conduct, compliance with which allows apparel to carry the official ‘No Sweat’ logo.

5 Sequenced regulation

As described above, new governance approaches to regulation rely more on collaborative efforts between government and industry to continuously learn about best practices. They also look to increase compliance through preventative and multi-level efforts rather than through traditional top-down command-and-control regulation. Ayres and Braithwaite (1992) argue for ‘enforced self-regulation’, where a regulatory agency negotiates particularized regulations with individual firms, with the threat of less tailored and more coercive rules if the firm fails to self-enforce and cooperate with the agency. They describe an advanced regulatory pyramid where self-regulation constitutes the base of the pyramid and escalated forms of enforcement, such as command regulation and punishment, are at the top (Ayres and Braithwaite 1992; see Figure 22.2).

The regulatory pyramid builds on the intuitive tit-for-tat (TFT) compliance model. The TFT model combines deterrence with persuasion, layering enforcement tools with a gradual escalation of punitive responses to misconduct. An enforcement pyramid will frequently begin with persuasion, move to a warning notification, and if that fails to bring compliance, the regulator will impose civil monetary penalties. In only a few, severe cases, will the regulator need to impose the ‘big guns’ of criminal penalties (see Figure 22.3). This increases commitment on behalf of the company, more so than if the standards are imposed by an external body. It also allows better tailoring of the risks and solutions to specific companies and encourages innovation by allowing the company to choose the least costly solutions. The regulator can ask corporations to take initiatives but then holds them accountable for their own self-regulation. Parker (2007) terms this type of ordering ‘meta-regulation’, where the law sets out to constitute corporate consciences by ‘getting companies to want to do what they should do’. In other words, the law becomes more process oriented as government, industry and civil society groups all share responsibility for achieving policy goals. Industry is expected to participate as part of a
search for common goals, not just rigidly asserting its narrow economic or political interests. The role of the government regulator changes from regulator and controller to facilitator and coordinator (Freeman 1997).

Building on organizational and motivational studies, regulators also increasingly focus on fostering cultures of ethical compliance. There is growing empirical evidence that institutional culture and design have a significant impact on the likelihood that individuals will engage in unlawful behavior (Arlen and Kraakman 1997, p. 687; Gibbons 1998, p. 115; Prendergast 1999). There are some findings, albeit limited, that an emphasis on a culture of regulatory compliance can carry over from one policy area to other areas, such that if a firm is focused on the legitimacy of a safe workplace, they may also be more likely to emphasize diversity

Source: Ayres and Braithwaite (1995).

**Figure 22.2 Sequenced regulation pyramid**
and environmental safety (Lobel forthcoming a). Agencies encourage participatory dialogue between industry actors, transparency and inclusive decision-making processes (Freeman and Farber 2005, p. 795).

For example, in the discrimination context, policymakers increasingly recognize that ‘[e]mployers’ organizational choices can both facilitate and constrain the development of discriminatory work cultures’ (Green 2005, p. 650). Therefore, the Equal Employment Opportunity Commission (EEOC) and some state civil rights agencies have recently guided workplaces to engage in prevention through recurrent antidiscrimination training programs. Similarly, the Occupational Safety and Health Administration (OSHA) offers programs requiring private companies to identify, investigate and monitor their own safety risks and near-miss accidents in order to acquire certification as ‘beyond compliance’ members of the OSHA collaborative and receive assistance from agency officials (Lobel 2006c). Cooperative compliance is currently introduced in diverse fields
of regulation ranging from occupational safety and health (Lobel 2005), antidiscrimination (Sturm 2001, 2006; Suk 2006); environmental hazardous substance regulation (Freeman 1995), food safety control (Simon 2006), endangered species regulations (Thomas 2003), civil rights compliance (Edelman et al. 1993), tax programs (Leviner 2008), and securities regulation (Ford 2008).

6 Experiments in third-way regulatory approaches

A central example of new governance shifts is in the area of occupational safety and health. The US Occupational Safety and Health Administration (OSHA) has broad power to regulate workplace safety across all industries. Partly because of this administrative power, OSHA has been commonly understood as a paradigmatic case study of bureaucratic regulatory failure. It has been accused of gross regulatory unreasonableness and described as exemplifying all the pathologies of the legal bureaucratic regime. Yet even in its first years, OSHA was directed by the legislature to adopt existing private industry standards by reference to associational safety codes.

At OSHA’s foundation, the agency entered into contractual relations with the non-governmental American National Standards Institute (ANSI) for the provision of technical support for the development and application of safety standards. ANSI sets standards through collaboration with corporations, professional organizations and trade associations. It oversees the processes of private standard-setting organizations and recommends their conclusions for incorporation into the standards promulgated by OSHA.

In spite of this attempt to generate industry-responsive standards through this partnership with ANSI, the standards were criticized as being inflexible and too universal in nature. The critique was that OSHA focused on the promulgation of substantive rules which established rigid universal standards for issues such as exposure to toxins. At the implementation stage, again the agency operated in an adversarial top-down manner vis-à-vis the private sector. The agency enforced these rules by random inspections of worksites and prosecution of violations.

OSHA’s rulemaking activities have been some of the most contested among agency action in the United States. In fact, with few exceptions, virtually every standard that OSHA attempted to promulgate has been attacked in court, often by both employer and worker groups. Beginning in the 1980s, major litigation resulted in judicial decisions striking down several of OSHA’s central top-down promulgated rules. The extensive litigation by private industry reflected the controversy that OSHA’s regulatory activity triggered in the business community. OSHA’s practice of adopting substantive rules and enforcing these rules invariably on all firms
National regulation in a global economy has perpetuated the image of an agency that is insensitive to the costs of its regulatory demands.

These realities of top-down detailed regulation and zealous enforcement led to intense resistance by industry. At the same time, research indicates that workplace accidents are often not a result of any particular legal violation. Rather, these accidents are commonly attributable to defects in planning, internal communication, definition of responsibilities and authority, deficiencies in training, inadequate supervision and the overarching absence of a culture of safety (Braithwaite 1985). Consequently, in recent years OSHA has shifted its emphasis from extensive elaboration of standards and high rates of inspection to fewer inspections and more programs of collaborative, semi-voluntary compliance.

At the state and federal levels, agencies are experimenting with innovative governance approaches to occupational health and safety. OSHA has adopted Cooperative Compliance Programs, which authorize employers to develop and implement their own safety requirements. Such programs of audited self-regulation require periodic corporate submissions of reports on self-monitoring, prevention activities and accident rates to the compliance agency. In 2004, the Government Accountability Office (GAO) found that the new cooperative strategies had improved safety and health practices by allowing OSHA to play a ‘collaborative, rather than a policing, role with employers’ (GAO 2004). These findings are consistent with a number of studies (OSHA 2005; Spieler 1994; Rees 1988). A derivative benefit of collaborative programs seems to be the reduction of production costs, explained by increased worker productivity and reductions in worker compensation costs (GAO 2004). Finally, less tangible benefits reported by program participants have increased trust between management and government and between management and workers (Lobel 2005).

These findings resonate with comparative studies on the significance of a culture of safety in organizations, such as Braithwaite’s (1985) study surveying 39 coal mine accidents in Australia, the United States, Britain, France, Belgium and Japan. In an Australian-based study, Fiona Haines (1997) studied 37 firms responsible for the deaths of workers at a multi-employer worksite, finding that responses by firms were attributable to differences in corporate culture. Haines identified two opposing safety cultures that corresponded with different levels of risk prevention activities: ‘virtuous cultures’ in which safety becomes integral to organizational processes and ‘non-virtuous cultures’ which push safety into the background in order to focus on short-term demands.

A second example of increased regulatory experimentation with new governance approaches is that of employment antidiscrimination. In the United States, employment discrimination policies have largely been based
on the civil rights model of the 1950s and 1960s – a regulatory, adversarial regime (Lobel 2007b). The main strategy was the direct prohibition of certain employer practices such as illegal consideration of gender and race, followed by top-down implementation and enforcement. This regulatory model was based on the assumption that employment discrimination is intentional and relatively easy to detect (Sturm 2001). The regulatory solution was usually a lawsuit for damages or an injunction against the particular discriminatory practices (Simon 2006). While the regulatory model has been effective in eliminating the most obvious and direct forms of discrimination, it has not effectively dealt with more subtle discriminatory practices. As the workplace has become more dynamic and multifaceted, discriminatory practices are frequently not the result of a direct decision to discriminate, but rather of complex practices, including corporate culture, informal norms, networking, training, mentoring and evaluation (Sturm 2001).

Sturm (2001, pp. 522–5) describes the emergence of an alternative governance-based approach, recently employed in many workplaces, that focuses on ongoing problem-solving efforts. This is done by engaging both outside consultants and workers themselves in reflexive efforts to eliminate workplace discrimination. In this context, the role of regulatory agencies shifts to incentivizing data-driven collaborative problem-solving processes (Sturm 2006). Suk (2006) argues that the British Equal Opportunities Commission (EOC) has assumed these roles of data collection and prevention activities comparatively better than the US EEOC. The EEOC has been slowly improving its procedures by increasing the number of guidelines that provide structural guidance to private industry, focusing on ex-ante prevention and elimination of discriminatory practices rather than ex-post dispute resolution (Zaring 2006).

At the same time, corporations are increasingly adopting voluntary codes of conduct as well as providing diversity training programs in the workplace (Allen and Montgomery 2001). These practices have in turn served as regulatory defenses or have reduced liability (Krawiec 2003). In the context of sexual harassment claims, the US Supreme Court has held in recent decisions that an employee’s failure to use an employer’s internal grievance procedure limits the liability of the employer for a hostile work environment (Faragher v. City of Boca Raton, 524 US 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)). Empirical studies show that these private efforts in the discrimination context are highly varied.

While corporate America often appears to be doing more than is legally required to promote workplace diversity, new studies indicate that only some types of private approaches are effective and the legal system must learn more about these variances (Dobbin et al. 2007). Consequently, some
commentators warn against overreliance by regulators and courts on voluntary internal reporting channels, arguing that often an employee may suffer greatly from reporting her supervisor and may rightly fear that her complaint will not be adequately investigated (Nielsen and Nelson 2005; Grossman 2003).

Other examples of new governance approaches are found in the Federal Organizational Sentencing Guidelines (OSG), which mitigates a corporation’s liability when the corporation demonstrates adequate internal processes for investigating wrongdoing (Webb and Molo 1993, p. 375). Again, some commentators are skeptical about these shifts, warning that when self-regulatory efforts by firms are merely cosmetic, governance approaches simply form liability shields without achieving the desired goals (Krawiec 2003). In other words, the law may allow employers to opt out of the regulatory framework without adequate assurances of the effectiveness of governance. Supporting these concerns are studies finding that simply adopting voluntary codes of conduct only alters behavior on rare occasions (Schwartz 2001).

As Chapter 13 in this volume explores, a related shift is the increased willingness in recent years to enforce an employee’s agreement to waive her litigation rights and arbitrate future employment claims. Theodore Eisenberg and Elizabeth Hill (2003) studied the ‘massive shift from in-court adjudication to arbitration’ in the last decade, finding little evidence of differences between arbitrated outcomes and trial outcomes. Another recent study on federal employment cases actually finds both higher success rates and awards for employee plaintiffs in arbitration than in federal district court trials (Deliket and Kleiner 2008).

As regulators around the world are increasingly interested in self-regulatory experiments, a final related issue concerns the individual employee’s ability to report illegal conduct (Lobel forthcoming a). Protections for employee whistleblowing may be necessary to complement requirements of systematic self-monitoring. Again, the increased reliance on the role of individual reporting stems in part from the need to react swiftly and flexibly to changing production and work practices in light of global competitiveness. In the US, different whistleblower statutes vary significantly in terms of the scope of employee protections. The Sarbanes-Oxley Act (SOX) and a few other statutes explicitly provide protection for employees that report illegalities in the workplace (Estlund 2005). At the state level, most statutory whistleblower protections include only external reporting, with variations as to which designated external recipient is included (Delaware Code; Washington Code; Maryland Ann. Code). In the United Kingdom, whistleblowers are only protected if they first attempt to report internally (Employment Rights Act 1996). If it is likely that internal whistleblowing
would result in an attempt to conceal the wrongdoing or induce retaliation, then external reporting is permitted. A whistleblower can skip the initial internal stage only if there is a reasonable belief that internal reporting would be ineffective and the report would be suppressed (Lewis 2001; Gobert and Punch 2000). Lobel (forthcoming a) argues that by emphasizing internal problem-solving over top-down government enforcement, the British approach of internal reporting sends a message that a culture of compliance can be created and maintained within corporations.

Organizational research indicates a significant link between procedural justice within a corporation and the willingness of employees to follow corporate strategic policy decisions and abide by company rules (Kim and Mauborgne 1993; Lind and Tyler 1988). Moreover, when employees view an internal reporting procedure as effective and fair, they are more likely to exercise individual dissent rather than opt for external reporting (Callahan and Collins 1992; Callahan and Dworkin 1994). In other words, the predominant variable determining whether whistleblowers will go public with their information is the availability of internal reporting channels and the assessment of whether using those channels will successfully end the wrongdoing (Miceli and Near 2001).

Apel (1995) argues that a common flaw of early corporate reporting systems was the lack of independence of the body that received reports (Apel 1995). Corporations often used the regular management channels as the single process for reporting concerns about illegal conduct within the organization. Work environments can either encourage or discourage employees to respond to unlawful behavior, depending in part on the reporting procedures adopted by the corporations (Feldman and Lobel 2008). Employees are more likely to use internal procedures when the procedures are formally established and the corporation asserts its commitment to a fair process (Attwood 2003; Lind and Tyler 1988). Under SOX, reports must go directly to the board of directors (Estlund 2005). Many companies also routinely have a bypass mechanism that requires a different person in the firm to make decisions about the employee after she has reported a violation by her direct supervisor (Murr 2006). Internal grievance procedures that institute reporting channels outside the chain of command build on the understanding that an employee is highly unlikely to risk reporting directly above him, especially when supervisors are implicated in the alleged illegal behavior (Callahan et al. 2002). Finally, anonymous reporting may be an important way to encourage internal reporting without fear of retribution (Sarbanes-Oxley Act 2002). This is especially true where internal compliance mechanisms are merely cosmetic and the corporation’s reporting process is de facto unrepelitive to complaints (Moberly 2007).
Some commentators describe this risk as ‘file-cabinet compliance’ (Murr 2006; Sherwyn et al. 2001). Regulatory agencies assume the role of retrieving more data on internal grievance procedures and learning which policies and structures are the most effective among various industry practices. In the federal system, for example, government agencies must disclose statistics on the number of discrimination complaints and their resolution (Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002). All of these developments signify the rise of a new approach to regulation which relies on internal monitoring and compliance systems, reporting procedures and alternative dispute resolution.

7 Conclusion

Philip Selznik (1949) described the democratic process as the means, instruments and tools ‘which define the relation between authority and the individual’. Global integration of markets, signifying the increased mobility of both capital and labor, has meant that employment regulation is no longer solely a national matter. At the same time, globalization has not led to homogeneous regulatory standards, nor has it in all instances led national regulators to loosen employment and labor standards. Rather, regulatory approaches have expanded and regulators are experimenting with ways to further involve private parties in ensuring ethical and socially responsible market practices. Governments, strapped for resources, facing shrinking budgets, international pressures to liberalize trade and corporate regulatory resistance, benefit from using private actors to complement standard-setting and enforcement activities. At the same time, private efforts do not serve as a substitute for government oversight in all instances because there are significant limits in the scope and depth of private industry interest in improving standards. Policymakers recognize that a better understanding of the comparative advantages of different institutional mechanisms and the breadth of the legal process spectrum will increase the effectiveness of policies in most, if not all, legal fields. Given the prevalence of both market and regulatory failure, regulatory alternatives are most likely to be imperfect (Komesar 1994). Most likely, some combination of all three approaches – market ordering, traditional regulation, and new governance strategies – will continue to be required in addressing most social problems.

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