Regulatory Legitimacy in the United States and the European Union

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in The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union

Published in print: 2001 Published Online: November 2003
Item type: chapter

Returns to themes sounded in the previous two chapters, elaborating them in the context of regulatory federalism: Majone discusses how regulatory independence may be reconciled with accountability, in a context where important policy-making powers are delegated to non-majoritarian institutions, an issue the American polity has grappled with for more than a century. Joint regulatory action, or regulatory cooperation, is a crucial feature of multi-level governance, where powers are not clearly allocated hierarchically, and in Europe, the emergence of transnational regulatory networks is the key development that will help Europe find coordinated rather than vertically distinct solutions to regulatory problems. However, this also entails important dilemmas of legitimacy: on the one hand, in the context of multi-level governance, values of technical competence and political independence argue in favour of governments delegating these joint regulatory activities to bodies of regulators from the various jurisdictions; on the other hand, this poses a very serious challenge to democratic legitimacy since there is no comprehensive democratic body or polity that can apparently effectively control the exercise of these delegated powers. Here, Majone dismisses various philosophies that have been tried in the USA and found echoes in the EU—from the traditional ‘transmission belt’ approach leaving no discretion to regulatory agencies, to the expertise model of the New Deal period or the pluralist proposal to politicize the regulatory process. Instead, he argues that, if one looks imaginatively at some of the control mechanisms that exist in the USA system today with respect to delegated federal regulatory powers, the problem may not at all be insuperable. In the EU, these procedural safeguards, designed to strengthen democratic legitimacy in general rather than simply state
rights, are all the more necessary since delegation to the Commission and to a lesser extent to outside bodies involves wide discretionary powers: in short, the EU should continue to strengthen its multi-level networks as well as to adopt the equivalent of the Federal Administrative Procedure Act and emulate the far-reaching judicialization of regulatory decision-making that has occurred since then in the USA.