THE YALE LAW JOURNAL POCKET PART

PETER DRAHOS

Does Dialogue Make a Difference? Structural Change and the Limits of Framing

How much difference does the mechanism of framing make to global regulatory outcomes? Structural explanations of regulatory globalization that are rooted in state power and self-interest would dismiss the explanatory value of framing. Put simply, words are cheap and do not matter to the final outcomes of globalization. In her recent article,[1] Amy Kapczynski challenges these structural explanations, asserting that the theory of framing offers a better account of the politics of intellectual property (IP) than public choice theory. I am in broad agreement with Kapczynski about the importance of incorporating framing into a theory of collective action. In this Response, however, I emphasize several limits to the power of framing in determining the outcomes of global politics.

Framing is a form of public dialogue in which actors wishing to change political processes offer an alternative conceptual scheme through which to reinterpret those processes. So, in the case of the issue of patents over pharmaceutical compounds, the decision by a state like India in the 1970s not to include such compounds as part of patentable subject matter could be framed using the basic concept of stealing. This allows for rhetorical propositions like "stealing from the mind" when it comes to interpreting what Indian generic companies were doing when they reproduced pharmaceutical compounds that were patented in countries like the United States.[2] A

1. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

2. PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 61 (2002).

counterframe to this can be built around the concept of access, which allows for claims that people have basic rights of access to medicines.

Kapczynski argues that recent developments in the regulatory globalization of intellectual property are better explained by the theory of framing than by public choice theory.[3] Public choice theory, she claims, would not have predicted the strong mobilization against the creation of stronger intellectual property laws, nor does it satisfactorily explain the success of industry coalitions in bringing about such laws.[4] In her account framing is a powerful causal variable that explains collective action when rational actor theories such as public choice do not. The possibility of framing makes politics less structurally determinate or, at least as she puts it, framing "should make us significantly less confident of our ability to predict political outcomes."[5] These are not trivial claims. They challenge rather large parts of the social sciences that have paid much more attention to power or self-interest in their explanations of actions and outcomes. In this Response then I want to focus on the catalyzing role of framing in collective action and in particular to ask what the limits of framing might be when it comes to achieving outcomes through its use in the kinds of global regulatory contests to be found in intellectual property standard-setting.

Before considering the limits of framing, I would like to note briefly that rational choice theorists have ways of countering Kapczynski's claim that their accounts fail to predict the emergence of initiatives like A2K. Mancur Olson at the time he wrote *The Logic of Collective Action* (1965) hardly could not have noticed successful examples of collective action on the part of diffuse interests, the existence of trade unions being one obvious example. The key point of his theory is that the costs of such collective action had to be met. In the case of unions it was membership drives and the collection of compulsory union dues. Meeting the costs of collective action is key to that action emerging. In the case of the A2K initiative, as Kapczynski herself notes, some of those costs are being met by various foundations interested in developing a diversity of thought around intellectual property.[6] Another critical point is that rational choice accounts assume that self-interest is not confined only to the pursuit of economic gain, but that it can also include social acceptance. As Philip Pettit has observed, self-interest may make us pursue attitude-dependent goods such

3. Kapczynski, *supra* note 1, at 842.

4. *Id.* at 820.

5. *Id.* at 884.

6. *Id.* at 841 n.174.

as a good reputation.[7] Geoffrey Brennan, a prominent theorist within the public choice tradition, has argued that "many academics are motivated more by a quest for regard than for income."[8] Putting this together, the rational choice theorist might argue that provided the economic costs of collective action are met (through, for example, foundation grants or university salaries) there is nothing surprising about the emergence of movements like A2K that allow many of the participants to acquire reputational goods in relation to globally important issues. I am not suggesting that this is *the* explanation for the emergence of A2K. Rather I think that before we conclude that public choice cannot explain A2K we need to see what the counterarguments might be under the richer set of assumptions for explaining human behavior to be found in that approach.

I am broadly in agreement with Kapczynski's claim about the importance of incorporating framing into a theory of collective action. In a study of globalization I conducted with my colleague John Braithwaite, which looked at more than twenty regulatory domains including intellectual property, we concluded that globalization was best understood as a contest of regulatory principles among actors using different mechanisms.[9] In developing a processual theory of the contest of principles, we linked principles to rhetoric and argued that actors on the losing side of a global regulatory contest should reframe that contest using different principles.[10] We also argued that had the property-theft-piracy frame been contested at the time of the negotiations on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), the pact might not have taken the final form it did.[11] Drawing on public health and human rights expertise, trade negotiators interested in opposing U.S. and E.U. pharmaceutical hegemony should have built a counterframe around the principles of timely access to medicines, equity in access, and the cost-effectiveness of medicines. Their slogan should have been, to paraphrase Jeremy Bentham, the greatest health of the greatest number. Such a frame would, of course, have served negotiators well in subsequent bilateral trade negotiations over intellectual property rights. So like Kapczynski we do see contingent possibilities in the politics of regulatory globalization.

---

7. Philip Pettit, *Institutional Design and Rational Choice*, *in* THE THEORY OF INSTITUTIONAL DESIGN 54, 64 (Robert E. Goodin ed., 1996).

8. Geoffrey Brennan, *Selection and the Currency of Reward*, *in* THE THEORY OF INSTITUTIONAL DESIGN, *supra* note 7, at 256, 264.

9. JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000).

10. *Id.* at 571-76.

11. *Id.* at 576.

But we also concluded inductively from our case studies that there were comparatively few cases in which a normative ideal of citizen sovereignty (for us the most important kind of sovereignty) was advanced compared to the sovereignty of big business or nation-states. The intuitive idea behind our normative ideal of citizen sovereignty was that the organized power of business and the state must be subservient to the power of individual citizens in ways that provide an assurance to those citizens against domination by others, as well as giving citizens the chance to shape the rules that deliver this assurance.[12] By implication, our empirical work suggests there are clear limits to the causal efficacy of framing when it comes to advancing this ideal of citizen sovereignty. Similarly, John Odell in his case studies of trade negotiations suggests that with the exception of the negotiations surrounding the Doha Declaration on the TRIPS Agreement and Public Health, reframing attempts have not been especially successful.[13] A theory of the limits of framing, he observes, has proved elusive.[14]

Even if we do not have a theory of the limits of framing we can suggest some factors that help explain its limits. To begin, framing is a dialogic mechanism. Borrowing a category from linguistic philosophy, we can characterize it as a speech act, albeit one that is often conveyed in frozen form through the media and information technologies.[15] Speech acts often fail to achieve their intended effects for all sorts of complicated reasons. The basic point is that once we see framing as a speech act we can also see that it is a subtle but fragile mechanism. Framing is most likely to be successful in the presence of two factors—a major crisis and a concerned mass public. Concerned mass publics have been influential actors in many areas of global business regulation, and not surprisingly their presence as actors has been closely tied to visible crises (for example, stock market crashes, environmental disasters such as the sinking of the supertanker the *Torrey Canyon* in 1967 and Three Mile Island in 1979, the thalidomide disaster).[16] While not at the height of his popularity these days in the United States, it is true that Ralph Nader's 1965 report *Unsafe at Any Speed*[17] improved the regulation of car safety around

12. The argument in full is to be found in JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION ch. 26 (2000).

13. John S. Odell, *Introduction*, *in* NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 1, 20-21 (John S. Odell ed., 2006).

14. John S. Odell & Susan K. Sell, *Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001*, *in* NEGOTIATING TRADE, *supra* note 13, at 85, 110.

15. For a full discussion of speech act theory, see J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962).

16. BRAITHWAITE & DRAHOS, *supra* note 9, at 476-77 tbl.20.1.

17. RALPH NADER, UNSAFE AT ANY SPEED (1965).

the world.[18] It remains a brilliant example of the way in which framing can capture the attention of a mass public.

Framing is also a mechanism that will rarely work on its own. It needs the support of other mechanisms such as modeling, a process in which weaker actors sometimes displace hegemonic models by placing alternative models of regulation on the table.[19] Framing, as a dialogic mechanism, will for the most part deliver only dialogic or negotiating victories. If a gain won through framing is to avoid the fate of symbolism, it must be followed by detailed regulatory models that, for example, force car manufacturers to produce safer cars. Elsewhere I have argued that the success of the Doha Declaration runs the real risk of becoming symbolic regulation precisely because the detailed system that followed it for the regulation of the importation of medicines by countries without manufacturing capacity reflected U.S. and E.U. pharmaceutical hegemony.[20] Framing, in short, is not a master mechanism, and needs the support of other mechanisms like modeling to bring genuine structural gains.

If it is true that we live in a world where webs of dialogue are more important than webs of coercion, then we have grounds for optimism about the capacity of weaker actors to influence processes of globalization even in core areas of property rights over knowledge; framing is a comparatively low-cost mechanism that is available to weaker players. But it also remains true that the mechanisms of military and economic coercion continue to exercise a deep influence on the futures of citizens everywhere. In words that have the timeless ring of truth about them, Cicero reminds us of the limits of eloquent words to reframe the minds of others when it is coercion that has been chosen:

> For me too it is a source of deep pain that the state feels no need of those weapons of counsel, of insight, and of authority, which I had learned to handle . . . . Indeed if there ever was a time in the history of the state when the authority and eloquence of a good citizen might have wrested arms from the hands of angry partisans, it was exactly then when through blindness or fear the door was abruptly closed upon the cause of peace.[21]

---

18. BRAITHWAITE & DRAHOS, *supra* note 9, at 438-39.

19. For the theory of modeling, see JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION ch. 25 (2000).

20. Peter Drahos, *Four Lessons for Developing Countries from the Trade Negotiations over Access to Medicines*, 28 LIVERPOOL L. REV. 11 (2007).

21. CICERO, BRUTUS, at ii.7-8 (G.L. Hendrickson trans., Harvard Univ. Press rev. ed. 1962) (46 BCE).

Peter Drahos is Professor in Law and Director of the Centre for the Governance of Knowledge and Development in the Regulatory Institutions Network (RegNet), College of Asia and the Pacific, at the Australian National University, Canberra. He currently holds a Chair in Intellectual Property at Queen Mary, University of London.

Preferred Citation: Peter Drahos, *Does Dialogue Make a Difference? Structural Change and the Limits of Framing*, 117 YALE L.J. POCKET PART 268 (2008), http://yalelawjournal.org/2008/06/01/drahos.html.