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Discussion

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JUDGE GINSBURG: I want to start off by asking you both to comment on a thought stimulated by something Professor Rose-Ackerman said—to the effect that we ought to think of environmental groups perhaps not as representing the unique public interest, but each one as representing some segment of the public. That strikes me as tantamount to saying—I do not mean to hold you to those particular words, if they were not indeed your’s—that each one of these organizations is, in fact, a good deal narrower than anything that one could equate with the whole public and, therefore, is just as much a special interest, in the usual sense of the word, as is the Hazardous Waste Treatment Council or a particular industry affected by some proposed regulation.

By way of background, it is my impression that, over the last twenty years, part of the intellectual turmoil that we have been going through has entailed a largely successful assault upon the notion that there is such a thing as the “public interest.” “Public choice” economics, if you accept it, ultimately forces one to this conclusion. Herbert Hovenkamp, in his recent book Enterprise and American Law,1 tries, over a sustained argument, to resuscitate the notion of a public interest using one fairly narrow and complicated example involving federal preemption of state railroad regulation. Without federal preemption, the growth of that industry would have been impossible as the states effectively Balkanized and taxed, so perhaps the only losers were the various state fiscs, and in the long run even they probably benefitted.

Professor Hovenkamp has to go a long distance to bring forth this single example, and, of course, it is open to some debate as well. Where do each of you stand on this? Is there a public interest, or is that just rhetoric in the battle of all against all for whatever spoils can be derived through the regulatory system?

PROFESSOR ROSE-ACKERMAN: I do not quite like the way you are putting this. We are a democracy, and what a democracy means to me is a set of procedures that permits us to make decisions even though we disagree very strongly about such matters as whether to worship God, what books to read, and how to behave. Even though we disagree on many things, we nevertheless agree that certain issues have to be decided collectively, and we have a process that does that.

Now, we may criticize aspects of the American democratic process, but it does produce legislation, and it does have majoritarian aspects. The public choice literature teaches, however, that the laws produced by such procedures will not fit together into a consistent

political philosophy. One cost of democracy is the messiness of the results.

I think it is a mistake to look for consistent, substantive “public interest” principles in the body of legislative texts taken together. Many of us who have been working in the environmental area for a long time have ideas about how the substantive law could be made better and more efficient. But I do not think that we can expect to see consistent outcomes from Congress.

The lack of rationality and consistency, however, does not mean that the laws are necessarily simply the result of interests yelling and screaming and pulling at each other. That is part of it, but many of the people involved in the process are principled individuals committed to policy goals. None of them is a dictator, however. No matter how public-spirited they think they are, they cannot always get their own way.

I do not think we need to choose between a public interest theory of legislation and a naked battle of interests. Much of the political infighting that occurs is between principled people with sharply different views of the public interest. If everyone agreed on the right outcome, we would not need democratic procedures. The state could just announce the right answer.

While environmental groups cannot always claim to have majority support, they, nevertheless, often have broad support for their positions that goes beyond the groups’ members. Because of collective action problems, agencies should facilitate the participation of environmental groups in agency policymaking processes. It furthers the goal of broad interest representation to support environmental group participation. In contrast, the government does not need to subsidize the participation of industry groups whose own economic interests are at stake, and who are quite capable of investing to present their own positions.

JUDGE GINSBURG: So if I can be terribly reductionist, you are saying, “It’s the process, stupid?”

PROFESSOR ROSE-Ackerman: Yes.

JUDGE GINSBURG: Okay. Dr. Greve, do you want to comment on that?

DR. GREVE: Yes. I have two brief comments. For one thing, I think processes are vastly overvalued. This is a very peculiar aspect of American administrative law. In particular, I think the legitimacy-enhancing effects of procedures are vastly exaggerated. I do not think there is much empirical evidence for the position that our processes and procedures enhance the legitimacy of the decisions that come out of the process. But if there is, by all means let’s have procedures. Let everyone be heard.
But the fundamental fact is that the environmentalists do not want to be heard. When they bring a lawsuit under the National Environmental Policy Act, they do not really mean to say: “Judge, what we are really concerned about is that typo on page 422 of the Environmental Impact Statement. Had the agency not done that, we would be satisfied with the outcome.” They want to win. And who could blame them? The question is whether you can leverage the procedures to sue on behalf of nobody so as to coerce others and transfer wealth. In other words, do you let the environmentalists sue or not?

As to the public interest aspect that Judge Ginsburg mentioned, let me say this: With respect to environmental legislation, I am not so confident about the first rounds of environmental law, legislation, and statutes. But I am quite confident on empirical grounds that the later rounds of the Clean Water Act Amendments, as well as the latest Clean Air Act Amendments, were slugfests among interest groups. The fault line in environmental policy is not between the environmentalists, on the one hand, and corporate America, on the other. If that were the fault line, no environmental law could ever get passed because the environmentalists would be wiped off the map. But in fact, the distributional and redistributive consequences and purposes of environmental law have long swamped the public interest purposes.

**JUDGE GINSBURG:** Let’s go to the line first.

**AUDIENCE:** I have a question for both panelists, I suppose particularly for Professor Rose-Ackerman. You have each addressed one idea about controlling faction in a republican government, and that is setting interest against interest. Another idea is to prevent government from accruing such powers so as to make winning that battle among interests so important. It seems to me that there has not been much talk about limiting the Federal Government’s power in this area. I have not heard the words “enumerated powers” uttered today. I wonder if there is any advantage to be gained by simply preventing government from accruing so much power, so that the game of interest group politics becomes less important.

**PROFESSOR ROSE-ACKERMAN:** In the environmental area there are many substantive problems that cannot be effectively dealt with except through Federal Government action. They cannot be resolved through private orderings or through devolving authority down to low-level government.

In other areas, however, deregulation makes sense. Consider, for example, deregulation of the trucking industry. That is a perfect example of what you are talking about. Rather than having everybody fight in the ICC, why not just deregulate this industry? There is no

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strong economic reason for regulating trucking. So from my point of view deregulation is a good idea, and Congress has, in fact, moved in that direction.

In air pollution, however, there are interjurisdictional problems that arise from the long-range transportation of pollution. The private market cannot handle these external effects. We do not have any other mechanism except the bureaucracy to deal with such difficulties. **JUDGE GINSBURG:** Dr. Greve, do you agree?

**DR. GREVE:** Yes. I agree with much of it, actually. I am less confident about common law liability solutions than some of my libertarian friends are. We will have environmental regulation on a large scale no matter what. In that light, you want to think about the institutional practices and devices that, on the whole and in the long-term, minimize the costs of serious error and the number of serious errors.

I agree with Professor Rose-Ackerman that, in terms of efficiency, we are not doing terribly well, and that there is a serious democratic deficit in environmental policymaking. There is a total lack of transparency, a total lack of accountability. You cannot even make heads or tails of it.

We disagree about the remedies. If I had to look some place where we could actually make some improvements, it would be to centralize the decisionmaking authority. You want to bring it as close to the White House as you can. You want the decisions to be made in a basement of the Office of Management and Budget, and to be able to say that they were made, if not exactly under adult supervision, at least under the eyes of Al Gore and Bill Clinton. (Laughter.)

**AUDIENCE:** I have some questions for Professor Rose-Ackerman. First of all, you begin with this basic premise that we are a democracy, and ergo we can have these interest groups fighting on each and every issue in society. Doesn’t the existence of a constitutionally limited government imply that there are certain issues, for example the question of rights, which despite how difficult they may be to resolve, are always fixed in society? That is why we have a constitutionally limited government.

Second, going on to talk about bureaucracy, you stated that these issues are so complicated that leaving them up to the legislature would require too much work and effort on their part. Therefore, you say we need to have these bureaucracies and have either finely tuned regulations or broad regulations, whichever is convenient at the moment. But the existence of these often contradictory regulations impairs people’s exercise of their own liberty. People cannot actually know the possible ends of their actions and the results that will occur if they act a certain way based on these contradictory laws.
Finally, with respect to accountability, it seems that the constitutionality of a regulation and whether or not it is authorized by an enumerated power should be sufficient grounds for a court to strike down a regulation.

**Professor Rose-Ackerman:** Well, yes. I did not mean to imply that the Constitution imposes no limits. We can argue about exactly what these limits are, but whatever they are, they provide a background condition for this discussion. I certainly accept the idea that rights are a constraint.

I do not think, however, that those limits imply anything about how specifically Congress should write the laws. The German Constitutional Court has argued that individual rights may be best protected by laws that are not too precisely specified. With open-ended laws, administrators can take into account individual situations when they are implementing a statute in particular cases.

Furthermore, contradictory and vague laws are undesirable for the reason that you raised. Individuals do not know what they are up against. I do not, however, think it is a problem that is particularly the fault of the bureaucracy. It can be a problem of the legislature as well.

**Audience:** Professor Rose-Ackerman, many of us may have thought humorous your description of the environmental movement and the collective action problem as being underrepresented compared to the average citizen, but that is not what I want to ask you about because I do not know that there is much to say about it.

**Professor Rose-Ackerman:** No, I did not say the average citizen; I said "the other organized groups."

**Audience:** What I am interested in is your description of the bureaucracy, with agencies as sort of neutral decisionmakers with their neutral scientific arm weighing the competing interests of the big bully industry and the underrepresented environmentalists. I wonder if you would comment on the public choice theory which holds that the pre-

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3. **Kalkar Case, Entscheidungen des Bundesverfassungsgerichts** 49, 89 (1979). The case dealt with the construction of a fast breeder reactor under the Atomic Power Act. The judges found that:

> Good reasons support the use of undefined legal terms in [the Atomic Energy Act]. The wording of . . . [the Act], which is open to future developments, serves as a dynamic protection of fundamental rights . . . . To fix a safety standard by establishing rigid rules, if that is even possible, would impede rather than promote technical developments and adequate safeguards for fundamental rights . . . In the interest of flexible protection of life and property, the executive must assess and constantly adjust safety measures—a task which it is better equipped to perform than the legislature.

**Id.** (Translation from Donald Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 154-55 (1989)). For further discussion of the relationship between German constitutional law and environmental policy, see Susan Rose-Ackerman, Controlling Environmental Policy: The Limits of Public Law in Germany and the United States, at ch. 6 (forthcoming 1994).
dominant factor in agency decisionmaking is not what either of these interests are interested in, but what will further the agencies’ own bureaucratic interests. Public choice theory would say that agency self-interest is the predominant factor. But I think it would be a problem, and I wonder if you would admit or deny that it is a problem, even if it were just a significant motivating factor? Let me just suggest two examples.

First, whether or not you define something as a serious environmental problem is going to determine how much research money, how much more funding, and how much enforcement mechanisms you are going to get, and agencies are obviously going to err on the side of saying it is a huge problem.

Secondly, even if agencies have been directed by Congress to come up with some standard for XYZ chemical, they are going to have a lot more future funding and a lot more people if they say this is a really grave concern; while science says that only ten parts per 1000 are really dangerous, we are going to put it at one part per billion. Do you admit that this is a significant or even predominant factor in agency decisionmaking?

Professor Rose-Ackerman: I accept the fact that agencies have interests that are a mixture of the interests of civil servants and of political appointees with agendas of their own. I do not think, however, that we should be especially cynical about civil servants. There are a lot of very fine people who are civil servants.

Audience: I am one.

Professor Rose-Ackerman: All right. Good. (Laughter.) Congratulations. The concerns you raise about bureaucratic goals speak, first of all, in favor of an administrative process that is open and publicly accountable and that includes judicial review to provide a check on both bureaucrats and interest groups. Second, Congress, accepting your view of the bureaucracy, has an incentive both to monitor on its own and to draft statutes with some care. White House review of regulations is another constraint. So we have multiple checks on the bureaucracy, but one important constraint is the open, accountable procedures that I was talking about.

Judge Ginsburg: Is Judge Williams here?

Dr. Greve: He was. He is hiding now.

Judge Ginsburg: Do you think, Judge Williams, that the judiciary can act as a check on bureaucratic self-aggrandizement? (Laughter.) Do you want to elaborate?

Judge Williams: I think the devices open to bureaucracies for evading judicial decisions are almost infinite.

Judge Ginsburg: I would suggest as well that the range of decisions open to the agency, which would all qualify as “reasonable” in light of
the record, is almost always fairly broad. One has to share the speaker's concern that at every turn the agency will choose the point within that range that best serves its own interest—whether it is interested in budget, or prestige, or power, or having an easy time of it, or what have you. That is a concern that I do not think can be answered simply by saying: "Well, there is always judicial review."

**Professor Rose-Ackerman:** Of course, there are problems that are never going to be completely resolved unless you completely remove discretion from the bureaucracy. As long as the bureaucracy has discretion, they are going to have some wiggle room, and we are just talking about constraining it in ways that seem to be consistent with our political principles.

**Judge Ginsburg:** Somebody—Dr. Greve or maybe you—mentioned OMB a minute ago, referring to White House review. Judicial review under the APA, with its largely procedural requirements, is a very loose constraint on the agency, for the reason Judge Williams stated. A standard that requires the agency to defend its decision as the single most cost efficient (or what have you) way of dealing with a problem is a much more constraining standard.

**Audience:** I would like to see if I understand the core of what you are saying before I ask a question. My understanding is that you are saying that truckers and unions, and so on, can be represented because they would have standing because they have an economic interest, whereas those who belong to environmental groups or whatever would not have standing. Is that correct?

**Professor Rose-Ackerman:** No. We are talking about two different institutions—the agencies and the courts. An agency organizes a hearing and invites interested persons and groups to comment. The unions come, the business firms come, but certain kinds of environmental interests might not be well organized enough to participate or to do a good job if they do appear. We are not talking about standing in the sense of standing in court. Instead, the issue is whether the agency needs to facilitate the participation of public interest groups.

As for the courts, I was arguing that environmental groups are often appropriate organizations to challenge the procedural basis of agency decisions and should be given standing just as a labor union or a business firm should be granted standing. I did not mean to favor them in that context.

**Audience:** Okay. Then you clarified what I wanted to know. Why then not expand our open arms to include all these other groups? Why not allow all those who would be grouped under any particular classification where they would like to be considered as a block to do the same thing? So, for instance, a Catholic church, would you agree,
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would be an appropriate application of the principle that I understand you are putting forth for environmental groups?

**Professor Rose-Ackerman:** If we are talking about an issue before an agency, such as EPA, that affects the Catholic Church, I imagine the Catholic Church is going to be in there testifying.

**Audience:** Sure.

**Professor Rose-Ackerman:** We do not have to worry about them too much.

**Audience:** No.

**Professor Rose-Ackerman:** But then after the EPA process is completed, suppose that the Catholic Church felt that it had not been provided enough of an opportunity to get its point of view across. It argues that the agency did not give the Church a chance to argue that it is not spreading pollution but is instead purveying religion. Fine, then the church might be an appropriate group to bring a lawsuit challenging agency procedures.

**Audience:** Even if the group were not, let's say, an official group? That is what I am trying to get around. Say you have a strong public interest group that collected ten million signatures and said: “Look, we want you to go after this.” Would you defend that?

**Professor Rose-Ackerman:** For the cases that I am talking about, a nexus of individualized injury is not very important. I do not see why it would affect the quality of your argument concerning the bureaucracy’s policymaking procedures if you had received a cut on your finger from the agency’s action. I do not think the identity of the litigant makes too much difference. In many of these cases we have multiple plaintiffs, who all join together. A problem would only arise if the courts could not consolidate these cases and had to try 500 or 5000 cases under generous standing rules.

**Audience:** It would seem that the case load would grow immeasurably. That is the only reason I asked this.

**Professor Rose-Ackerman:** Yes. The courts obviously have to have some way to manage their caseloads so that the circuits are not hearing identical cases.

**Audience:** So the environmentalists would be the only ones to have a special status?

**Professor Rose-Ackerman:** I do not think so.

**Dr. Greve:** I do not think the real serious problem is the capacity of the courts, because as a matter of practice, litigation is expensive. People have to have some sort of interest to band together and to step forward. So it will not be the case that literally everybody is coming into the courts.

The real, fundamental problem you have to deal with is that all of these cases, unless they are brought by the objects of regulation them-
selves, are efforts to mobilize the judicial power to bully the agency into coercing somebody else, and you have to ask yourself the fundamental question of whether that is what you want. Maybe you want to grant that right to David Doniger and his friends. But there are cases popping up now in the courts where the Hazardous Waste Treatment Council pulls these stunts.

Now, there is in standing analysis something that is even more perplexing than "injury in fact" itself, and that is the "zone of interest" test. The question that the courts ask themselves when the Hazardous Waste Treatment Council and so forth bring cases is whether these kinds of plaintiffs fall within the zone of interest of the statute as contemplated by Congress. The environmentalists always do. But what if the Hazardous Waste Treatment Council, which wants to prevent recycling so that there will be more waste that Waste Management, Inc., can then handle, tries to force the agency into doing something that it is not prepared to do because it might increase the net volume of toxic waste? Obviously, you have a charade on your hands. The Hazardous Waste Treatment Council says: "Your Honor, we are really sincere. We really want to help the environment. We are within the zone of interest." But what the lawsuit really aims at is just a net wealth transfer; the plaintiffs want the agency to do something that is good for the plaintiffs.

From Professor Rose-Ackerman's standpoint, the zone of interest test should not matter at all because all the plaintiffs care about is really observance of the procedures in the abstract. I submit that that is never really the case. There is a question of substance lurking right underneath it.

**JUDGE GINSBURG:** On the other hand, it does not follow that because the outcome is good for them, it is bad for anyone else.

**DR. GREVE:** Right.

**JUDGE GINSBURG:** I am not sure how much significance to attach to that. Well, as it turns out I was overly optimistic. We have time left for one brilliant question. You have one? (Laughter.)

**AUDIENCE:** I think I understand, if not the principles of standing, at least the general forum in which the language of that debate is conducted. But I would like to present a somewhat different issue on standing.

A major part of the environmental expenditure these days occurs in the clean up of federal properties. What is the equivalent approach when say DOD or DOE has working for it people who believe agency decisions are unreasonable, particularly when the decision is based not on outstanding regulations that have gone through the process we have discussed, but on internal memoranda that do not even get circulated to the point where they become visible enough to challenge.
What does someone do who is outside the federal establishment and is not constrained by what may influence members of DOD as to whether or not they wish to challenge actions? What avenues are available to that sort of person, who by ordinary principles of standing as a taxpayer has no standing whatsoever, even though the attack on the public fisc is certainly as serious as the complaints of the environmentalists?

**Judge Ginsburg:** Professor Rose-Ackerman, do you have a solution to that difficulty?

**Professor Rose-Ackerman:** No. But your question is part of a general debate in administrative law, not just about federal facilities, but about a whole range of agency activities that avoid the informal rulemaking processes of the APA. I am thinking, for example, of the D.C. Circuit Court's opinion that held that agencies can issue guidance documents and circulars, but that they cannot treat such documents as if they had legal force when applied to individual cases. The cases you raise are a little more complicated because it may be hard for somebody on the outside even to know what is happening within the agency.

**Audience:** Even if they know, where do they get the basis to challenge?

**Judge Ginsburg:** I think it was in February 1993 that we were hearing talk about possibly subjecting all of the other agencies of the Federal Government to the jurisdiction of EPA. That would no doubt have ground government to a virtual halt—something about which we would all have mixed views, I am sure.

**Professor Rose-Ackerman:** There are arguments for treating government agencies no differently from private groups—for applying the same rules to them that are applied to others.

**Audience:** There has been a lot of discussion about process during this session. But what really is behind a lot of the real world problems that go on here is misapprehension of what the underlying facts are. What is really going on in the environment? Is there a greenhouse effect? Is there an ozone hole problem?

The problem I see is that, if you believe in witches, refining the process and whether you have standing to sue does not matter very much. If you are going to execute witches because they are witches and you believe they are real, you are going to have incredible things occur in your society.

I think the underlying problem here is one of public knowledge of the facts and public fears. Unfortunately, I think, a major responsibil-

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ity falls on scientists to go out there and educate the public. Science is at fault because it does not interface the way even the lawyers do. I am afraid that a lot of what goes on here is sort of this notion that somehow, if we could refine legal process, we would improve results. I think there is, of course, some merit to that. No question about it. And the way you do fact-finding is important in connection with that.

But underlying all this, I think, is that you have a public and you have a lot of people who use public fears for power purposes. The public is afraid of things that are simply nonexistent, that are simply shadows in the dark. These fears have to be addressed. They can be addressed effectively, I think. Not by agency decisions, but only by educating the public to know what the facts are. Education will have to come from responsible, technically qualified people.

**Professor Rose-Ackerman:** I do not disagree with that.

**Dr. Greve:** I wholeheartedly agree that there is a limit to the difference institutional arrangements will make. But on the presumption that the entire American public has gone insane—and there is some evidence for that—the question is still: “What institutional system do you want?” Do you want a system that says: “We are always open for business, and no matter how crackpot your idea, we will hear you out?” Or do you want a system that builds barriers, and that has a certain built-in inertia and does not fall all over itself to implement the next crazy idea? This is a real question, then, and I think it is worth thinking about.

**Judge Ginsburg:** And it is also the subject of Peter Huber’s book, *Galileo’s Revenge,* about which he spoke to us at lunch last year. But I see that we have overstayed our lease. Please join me in thanking our debaters.

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