Special Interests v. the Public Interest: Money Talks in Environmental Regulation

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Thank you for inviting me to participate in what has been an interesting and educational program. It is nice to be here on such a beautiful, sunny day and to get a break from the cold, rainy weather we have been having back east.¹

This is my first time visiting Boalt Hall, though I almost came here for law school 20 years ago. But I grew up in a conservative family in the Midwest, and my parents were afraid that if I came to Berkeley, I would turn into a long-haired, bearded environmentalist.² I guess you can score one more for nature over nurture.

The issue for this symposium is: Who holds the reins of environmental regulation? Is it Clinton and Gore? The EPA? Members of Congress? Environmentalists? Community groups? Is it big developers and the regulated industries? Or is it El Niño? Don't laugh. The government agency that has responsibility for tracking and reporting on El Niño is the National Oceanic and Atmospheric Administration. Its acronym is NOAA. El Niño: meet “Noah.” After 40 days of rain out here, it can hardly be

¹. But c.f. National Weather Service, <http://www.noaa.gov/nws/nws.html> (noting that the weather “back east” had been wet, but not nearly as wet as the San Francisco Bay area).

called a coincidence.  

I believe that each of these groups and entities has a hand on the reins of environmental regulation. For me, the metaphor that comes to mind is that of a stagecoach racing across a prairie. Congress and the agencies are the horses. The developers and regulated industries are up on the jump seat cracking the whip. Environmental and community groups are hanging on to the bridle from the sides desperately trying to steer the coach in one direction or the other.

The truth is that the playing field is not level. If you want to see who is really in control of environmental regulation, follow the money. In his book Arrogant Capital, Kevin Phillips wrote about how Washington, D.C., had become a city of entrenched special interests and how those special interests were undermining representational democracy. Phillips is right. There is no doubt that special interests dominate the public interest in America today.

The best way to level the playing field is to ensure that the citizenry is informed, actively involved, and willing to put a spotlight on inadequate rules or enforcement. As often as not, that means a willingness to go to court. To do that, we need strong environmental laws that provide adequate opportunities for public input, as well as citizen suit provisions to ensure that they get their day in court. But before we can examine who holds the reins of environmental regulation, we need to know something about the context within which regulation takes place.

I.

THE "MEANING" OF REGULATION

What is the first thing that you think of when you hear the word “regulation”? “Red tape”? “Bureaucracy”? “Inefficiency”? To answer this, I have to tell you an inside-the-beltway story about government regulation. (The best part about the story is that it is mostly true.)

3. See Genesis 6:9. The fact that “El Niño” refers to the Christ Child and that Noah was carrying out the Lord's directive to protect endangered species from the flood appears to underscore the connection. But c.f. U.S. House of Representative Richard Pombo’s (R-CA) claims last year that the Endangered Species Act was responsible for widespread flooding in the Central Valley.

4. Where do the courts fit into this metaphor? They are the posse. But it is a big country out there, and it is not always easy to find one little stagecoach, especially when the drivers are doing everything in their power to stay away from the posse.

Back in the early Eighties, there was a butcher in Eugene, Oregon who sold only organic meats. That meant, among other things, that they were cured the old-fashioned way, using brine instead of chemicals like sodium nitrite. Unfortunately, the butcher ran into a problem with the U.S. Department of Agriculture. The regulations did not allow him to get the USDA stamp of approval for meats cured with brine unless they were physically inspected. So the butcher had to pack some samples in dry ice and fly to Washington, D.C., to have them inspected.

In Washington, the USDA inspector opened the box and took out the samples. He looked them over. He smelled them. Then he tasted them. After he finished, he told the butcher that the meat was fine and that he would give the USDA stamp of approval on one condition: the butcher had to put a label on each box, saying “refrigerate at or below 40 degrees Fahrenheit.” The butcher replied that that was no problem because all of his labels already said “keep frozen.” The inspector sat back in his chair with a kind of perplexed look on his face. He had a real dilemma on his hands. Suddenly, he sat up, smiling, and announced: “I’ll make you a deal. You can have the USDA stamp of approval if your labels say ‘keep frozen at or below 40 degrees Fahrenheit.’”

There are at least three ways to look at this story. One is that the inspector is a good government bureaucrat doing his job to ensure a safe and healthy food supply for all Americans. Another perspective is that this is a classic case of excessive government regulations and inflexible bureaucracy. The third view is that agribusiness wields so much power that it can influence an entire regulatory scheme, making it extremely difficult for small producers to sell chemical-free meat to consumers. While there is probably some truth in each of these scenarios, the third perspective may be closest to the mark.

So, when you heard the word “regulation,” you probably thought of red tape, bureaucracy, and inefficiency. According to polls, focus groups, and my first-hand experience, most people think of the same things. Frankly, it is a testament to corporate America’s ability to control the message on this issue. They have made regulations sound like something mean and awful. It is also a testament to the state and federal politicians who have jumped on the “anti-regulatory” bandwagon.

Some of you may be familiar with Texas Congressman Tom DeLay. He is the third-ranking Republican in the House of Representatives and one of the leaders of the “anti-regulatory” movement in Congress. Before coming to Congress, Representa-
tive DeLay had a career, perhaps appropriately, as an exterminator. When asked once whether there were any government regulations that should be kept in place, he said "not that I can think of." He went on to cite an example of what he thought was a bad government regulation—the banning of DDT—because, he insisted, "it's not harmful."  

Representative DeLay and his friends are entitled to their perspective, but there are some regulations that they conveniently seem to ignore or forget. Traffic safety laws, including speed limits, windshield safety glass requirements, and mandatory child restraint seats, are clearly beneficial to society. Prior to these laws, windshields would shatter in accidents, causing severe cuts and lacerations. Children did not have to sit in special safety seats, and cars did not have seat belts. Many kids were severely injured or killed as a result. Unleaded gasoline is another example of good regulation. The benefits of reducing airborne lead levels are unquestioned.

Laws that give workers the right to know what toxic chemicals they are being exposed to in the workplace are also beneficial to society. Banking regulations that prevent financial institutions from engaging in the kind of reckless behavior that contributed to the Great Depression provide yet another example. In short, I would suggest that not all government regulations are bad, and that some have even been good.

II.
ENVIRONMENTAL REGULATIONS: A STRANGE LIKENESS

If your first reaction to the word "regulation" was mostly negative, is it any different when you hear the words "environmental regulation?"

It is different for most people. Focus groups and polls have consistently shown broad and strong support for environmental regulations. For example, a 1996 survey found that nearly one-half of all Americans favored stronger regulations than were on the books. Another poll, from Washington State, revealed that more than two-thirds supported either stronger environmental regulations or better enforcement of existing rules. Still, this

7. Id.
support does not mean that environmental regulations will get stronger or be better enforced. After all, the question here is not about the regulations, it is about who holds the reins of the regulations.

My first job after college taught me a lesson about who holds those reins. It was on the assembly line in Detroit building Cadillacs. My job was to clean grease spots off the carpets and upholstery as the cars rolled off the line. That meant I had to dip my hands into a big stainless steel canister of a sickly-smelling solvent some 800 or 1,000 times a day. No special gloves. No breathing protection. And definitely no information about what my hands were soaking in all day long. I wish I had known what was in that solvent. I still do not know. General Motors was not required to tell me. They were not required to tell their workers even the most basic information about the chemicals they were handling.

Is requiring companies to provide that information to their workers an example of over-regulation? Most people would say no. Prior to the seventies, most people simply trusted their employers to take care of them and to tell them if there was anything they should be concerned about. Today, many states have some form of worker right-to-know laws, but people assume, incorrectly, that the problem has gone away.

III.
THE GREENBACK SPECIAL

I said before that the playing field is not level. Let me give you a couple of examples of why I believe that to be the case.

In 1996, as in other years, the business community was by far the biggest source of campaign contributions to candidates for the U.S. Congress. Contributions from business political action committees (PACs) and corporate executives outpaced contributions from organized labor by eleven to one.10 We have heard a lot in the press recently about labor's alleged undue influence in electoral politics. Let us put this in perspective. Business gave nearly $450 million to Congressional candidates in 1995 and 1996, $270 million of it to Republicans.11 By contrast, labor unions gave just $49 million during the same period, the vast majority to Democrats.12 If you want to get a sense of

11. Id.
12. Id.
how pervasive the business community’s influence is, consider that they gave nearly $180 million to Democrats during that cycle. That is almost four times as much as labor contributed. I would say that gives them a pretty good grip on the reins of environmental regulation.

Do campaign contributions help buy access to regulation? In 1995, lawyers and lobbyists for some of the biggest polluters in America were invited to Congress to rewrite the Clean Water Act. It is true that all of us have the opportunity to draft our own vision of what the Clean Water Act and other environmental laws should look like. There is also no question that environmental groups, if they are doing their job, are pushing their own proposals. But I see a big difference between groups promoting legislation to benefit the public interest and big corporations being invited in by Congressional leaders to write legislation in which they have a direct financial stake. That is having your hands on the reins of environmental regulation.

If campaign contributions provide access to the halls of power, do they also translate into votes? When Common Cause looked at a key 1997 Senate vote to end a taxpayer subsidy for logging companies to build roads on the National Forests, it found that senators voting against the amendment had received an average of nearly $28,000 from timber industry political action committees over the prior six years. That was more than four times the amount received by Senators voting for an end to the subsidy. You do the math.

There are other reasons why the playing field is not level. Big corporations spend tens, perhaps hundreds, of millions of dollars each year on soft, image-enhancing campaigns that use feel-good ads designed to help the public and the media see them as good corporate citizens. Many of these ad campaigns have nothing to do with product marketing. For example, Weyerhaeuser runs ads showing aerial shots of beautiful intact forests and rows of little seedlings. They do not show you their massive clearcuts.

Companies such as International Paper or Georgia Pacific might show a child romping through a tree nursery with perfectly straight rows of trees in the background, talking about how mommy is a scientist who makes the water cleaner. They

13. Id.
15. COMMON CAUSE, CARRYING A BIG STICK: HOW BIG TIMBER TRIUMPHS IN WASHINGTON (1997).
do not show pipes pouring dioxin-laden wastes into rivers and lakes. These ads are effective, but they are not trying to get you to buy their products so much as they are trying to get you to buy their vision of the world.

How many of you go into Home Depot to buy a two by four or sheet of plywood and ask specifically for something from Weyerhaeuser? How many of you go into Staples to buy paper for your computer printer and ask specifically for something from International Paper? You don't. The purpose of these campaigns is to make people feel good about the industry in general and the corporation in particular. It works. We did a focus group 18 months ago and when the name “Weyerhaeuser” came up, some participants immediately said “the tree growing people.”

These companies know that it works to focus on children and talk about future generations. They know that it works to make the child's mother or father a scientist, because scientists have huge credibility among the American public. I can tell you they would never run the ad saying “my daddy's a lawyer for Georgia Pacific.” The corporations also know that they can use the ads at an even more subtle level to make people start to equate a tree farm with a forest. They are cultivating a political climate that gives them greater leverage as they work on Capitol Hill, in the regulatory agencies, and in the courts to shape environmental regulations that would allow them to increase logging on the National Forests. And they do it very effectively. Most importantly, though, there has been no way that any environmental group could hope to counter the kind of impact that the big timber companies and other corporations get with this kind of image advertising. This is just another way that they are able to strengthen their hold on the reins of environmental regulation.

I could cite many other examples of why the playing field is not level, but I will leave you with just one more tonight. Environmental regulation is becoming increasingly complex. As it does, it is the big corporations that are better able to marshal the scientific and technical resources needed to tackle complex regulatory issues such as setting exposure limits, cleanup standards, or preparing cost-benefit analyses. In these situations, environmental groups do not hold the reins, nor do neighborhood groups in poor or minority communities who want to keep an international consortium from building a hazardous waste incinerator down the street. It is the regulated industries and their trade associations that have control.
IV.
RENEWING INTEREST IN THE PUBLIC INTEREST

This is not meant to be an indictment of corporate America per se. It is really just an assessment of who holds the reins of environmental regulation. Corporations and the people who run them have very powerful financial incentives to behave exactly as they are behaving. That is an explanation, not an excuse. If I am right, we ought to do something about it.

What can be done to ensure that environmental regulations protect the public interest rather than serving the special interests? Unfortunately, there are no silver bullets. But if we go back to my stagecoach metaphor, the first thing that has to happen is to decouple the stagecoach from the team of horses. Translated into the political arena, that means campaign finance reform. It may not seem like much of an environmental issue on its face, but I can assure you that it is an essential first step to loosening industry's grip on the reins.

Second, our Nation's founders did a pretty good job of setting up a system of checks and balances designed to promote and preserve democracy. The place that citizens have the greatest chance of leveling the field is in the courts. The principle of providing citizens with access to the courts is a cornerstone of our democracy. As Chief Justice John Marshall said more than 200 years ago: the ability of citizens to challenge government actions in court is "the very essence of civil liberty."16

We have certainly seen what happens when the courts are stripped of jurisdiction to enforce environmental laws—the results have been devastating.17 So we need to make sure that there are mechanisms in place that provide the public with meaningful access to decisionmaking and to the courts.

Last but not least, we should think about whether it makes sense to take some steps toward what a few commentators call "direct democracy" in an effort to bypass the special interests. But a prerequisite of any movement in that direction is giving people a reason to care and a reason to get involved.

As a group, Americans are great at responding to crises, but they are hard to motivate in the absence of a crisis. One approach that has found some success is building bridges beyond our usual peer or social groups. Most environmentalists still

have not learned how to talk to the rest of the world, though they are quite good at talking to each other. For example, the prototypical hippie, vegan environmentalist with a tie-dyed shirt and sandals does not have a prayer of convincing hunters and anglers that reducing logging on the National Forests is in their interest, too. Even though it clearly is.

They—we—have to understand the importance of using the right language, and the right messengers, to build those bridges and to communicate with others.

By building bridges to non-traditional constituencies and getting them involved in the political process from a local level, by supporting campaign finance reform, and by supporting environmental laws that guarantee public participation and access to the courts, we can start the process of decoupling that stagecoach. We can start the process of renewing interest in The Public Interest. Hopefully, we can begin to loosen the regulated industries’ grip on the reins of environmental regulation.