Bureaucratic Discretion and Deliberative Democracy

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Modern democracies appear to have lost many of the features that might permit them function in the most democratic manner. The sheer scale of decision-making required, the complexity of the decisions being made, and the range of information (technical and distributional) required make it difficult for representative political institutions to function as expected in their constitutional theories about democracy. Legislatures and political executives, even when using their decree powers (Carey and Shugart, 1998), appear incapable of making all the decisions that are required.

Legislatures still make laws, but they generally pass those laws as broad frames and principles, rather than as detailed specifications of the programs to be implemented. The vacuum of detailed rulemaking that is left by the problems of legislatures and political executives has been filled in large part by bureaucratic institutions. Through various processes of issuing secondary legislation (Baldwin, 1995; Chevallier, 1994; Kerwin, 1999) these institutions transform primary law written by legislatures into rules that are utilized when implementing public policies. The bureaucratic agencies must have some legislative "peg" on which to hang their rulemaking, but so long as that peg exists they are able to exercise substantial discretion.

The Question of Discretion
Monitoring and controlling bureaucratic discretion constitutes, therefore, a major challenge for contemporary democracies (for a general discussion see Handler, 1986). That having been said, there are arguments in favor of making differing degrees of discretion and autonomy available for bureaucratic actors. The conventional democratic argument is that discretion must be tightly controlled, but there are also arguments, albeit often utilitarian ones, that can be made on behalf of greater discretion.

In Praise of Discretion
Contrary to the conventional view, administrative discretion appears necessary, and in some cases also highly desirable on utilitarian grounds (see Rourke, 1984; Bardach and Kagan, 1982). Legislatures rarely have the time or the expertise required to make the types of decisions governing modern societies requires. The actual quality of government decision-making, therefore, often can be higher if government permits substantial bureaucratic discretion.\(^1\) Granting substantial discretion permits involving more substantive expertise and also permits implementation decisions to be linked more closely with the initial legislative intentions about policy, provided that the discretion is exercised in a thoughtful and constructive manner. The capacity to link rulemaking with implementation also should be expected to enhance the overall quality of governance.\(^2\) Handler (1996), for example, argues that permitting discretion in implementation enhances an agency’s flexibility in responding to specific problems and is therefore both necessary and desirable for effective implementation. It is virtually impossible for a rulemaking body, whether legislative or bureaucratic, to anticipate the range of variation that may arise in the actual implementation of a program so that building in flexibility is crucial.

\(^1\) For a contrary view arguing that discretion is in practice limited by existing legal frameworks see Bryner (1987).

\(^2\) This may appear to be the familiar "bottom up" argument from implementation theory (Elmore, 1980). We do not, however, argue that implementation considerations should necessary drive rulemaking, only that if they are linked decisions may be superior. This analysis also assumes that we can measure the quality of rulemaking with some unambiguous standards.
Just as involving interest groups and experts at the formulation stage is useful, so too is involving them later in the policy process. The later involvement of groups is important for democratic as well as for utilitarian reasons. If major policy changes do occur during the implementation stage of the policy process (Pressman and Wildavsky, 1976), then there should be greater opportunity for involvement of the public (whether formally organized or not) than is usually considered feasible or desirable in most versions of the administrative process (Roberts, 1997). Indeed, the "backward-mapping" (Elmore, 1980; but see Linder and Peters, 1987) approach to implementation would assume that these groups and their concerns might be a principal issue in the design of programs.

The Forces of Constraint

While the advocates of greater discretion have some powerful points to make, the advocates of greater constraint also have important arguments on behalf of controlling bureaucracies. The degree of discretion now vested in bureaucracies appears to many critics to constitute an extremely undemocratic means of making public policies (Scheuerman 1994). Institutions that have no electoral linkage with the public are being granted a substantial amount of power over decisions, with consequent threats to the legitimacy of the policy being adopted. This delegation leaves legislatures and political executives with the difficult task of keeping track of the large volume of decisions, and attempting to monitor them in a meaningful manner.

The political control of bureaucratic discretion, therefore, becomes a central problem for democracies. Bureaucratic discretion is hardly a new problem in governing; the famous Friedrich-Finer debate about bureaucratic discretion and the mechanisms for control is now over a half-century old, and that debate itself represented a well-developed literature, as well as long practical experience. More recent research demonstrates that delegation as a form of political control is weak in traditional hierarchical systems of public administration (Kelly 1998). The bureaucratic actors certainly accept the latitude they are given but tend not to accept the implied controls.

The expanding degree of latitude for choice now available to bureaucracies in the wake of decentralizing reform movements such as the New Public Management, and the continuing fragmentation of other institutions, heightens popular and academic concerns about possible abuses of discretion (Craig, 1990; Schoenbrod, 1993; Spence, 1997). This concern appears to cover the ideological spectrum, with critics on the left arguing that discretion permits powerful social interests with access to agency rulemaking to impose their wishes on society. The political right, on the other hand, argues that bureaucracies are excessively rigid and dogmatic, and impose their own priorities on the private sector, especially on private business.

In addition to the institutional problems of making decisions in a timely and effective manner, the public in many countries has become increasingly concerned about its participatory rights and has mobilized politically to achieve a greater level of "citizen engagement" in government and policy (Pierre, 1999; Roberts, 1997, 131). This populist movement has been perhaps the strongest in the North American and Antipodean countries, but also has been evident in a number of cases such as Germany where it might be less expected (Peters, 1999; Klein and Schmalz-Bruns, 1997). The bureaucracy might appear on the face of it to be a poor institutional location for this participatory style of governance, but as we have argued elsewhere (Hunold and Peters, 1999; Hunold 2001) there are actually some substantial advantages for the bureaucracy in creating a more participatory style of governing (Seidenfeld, 1992; Sunstein, 1986; see also Ventriss, 1997).
It should also be noted that there is also a relationship between the intellectual persuasion of scholars concerned with bureaucratic discretion and their assumptions about its desirability. On the one hand, scholars operating from a rational choice perspective tend to assume that constraining discretion is the more important concern. On the other hand, scholars more interested in administrative efficiency as well as those concerned with democratic involvement of the public tend to focus more on permitting substantial, albeit certainly not unlimited, discretion for administrators.

This paper argues for expanding the use of deliberatively democratic methods of public administration on democratic and technical grounds. The monitoring and control of bureaucratic discretion in rulemaking is a central problem for contemporary democratic theory, as well as for public administration. Further, the institutions that are generally assumed to perform this task increasingly are proving themselves incapable of doing so adequately. However, it may be possible for more democratic and participatory instruments to fill some of that gap. These instruments will produce some problems of their own, but they do offer a means of involving the public directly in the control of the institutions that administer in their name. These mechanisms may also have the unexpected benefit of improving the quality of decisions being made in the public sector.

In addition to making the case for more public involvement in public administration, we examine the ability of bureaucratic organizations actually to function as deliberative democracies. To this end, we discuss four barriers to widening the use of deliberatively democratic methods of administrative rulemaking. These barriers include: (1) the insufficient inclusiveness of most existing public consultations; (2) the difficulty of institutionalizing continuous discussions between administrators and citizens; (3) inequality among the participants of deliberative rulemaking processes; and (4) the reluctance of many administrators to regard the results of such deliberative processes as binding. The prospects for turning public bureaucracies into more deliberative institutions will depend in part on their capacity for lowering these barriers to democratic deliberation and decision-making.

**Institutions for Control**

There are a number of institutions already in place for the control of bureaucracy. These institutions have functioned well historically, and in many ways continue to function adequately. As noted, however, the volume and level of detail of the decisions being made by contemporary public bureaucracies do present some important challenges to these mechanisms for control. A brief review of these existing institutions and their role in controlling bureaucratic discretion will help to make this argument more clearly.

**Legislatures**

The process of writing legislation in contemporary parliaments is usually done in terms of writing broad pieces of law, with grants of power to the bureaucracy to fill in the details. This delegation of authority then produces an immense volume of "orders in council" or "regulations" that have the force of law provided they are made through established procedures. The tasks of

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3This may be simply because it is easier to model, rather than because of any particular commitment to democratic accountability. In particular, the control of discretion is a classic case of the principal-agent problem (McCubbins, Noll and Weingast, 1989). For example, in the United States regulations must be made in accordance with the Administrative Procedures Act of 1946 (see Freedman, 1980).
the legislature then becomes reviewing the secondary legislation and assuring itself that these rules do indeed correspond to the intentions of the primary legislation. Likewise, the legislature will want to be able to correct any decisions by the bureaucracy that go against its intentions.

Having delegated responsibility, however, it is sometimes difficult to claw it back. Even legislatures with adequate staffing and well-developed committee structures such as the US Congress find this difficult. A "police patrol" style of oversight (McCubbins and Schwartz, 1984) easily becomes overwhelmed so that legislatures more often rely on "fire alarms" and respond to more egregious cases of variance by bureaucracies from intentions. That style of oversight, however, in essence relies upon more populist forms of oversight to alert the legislature to the bureaucracy's errors. If it is to work, there is a need for a trigger, often coming from outside the legislature, for the committee or the whole body to begin to exert its powers.

The possibilities for effective legislative oversight in less adequately organized institutions are predictably rather more tenuous (see for example Wiberg, 1994). This apparent deficiency in oversight exists in part because in parliamentary systems the notion of administrative oversight is in general less adequately developed. Accountability systems in parliamentary systems often are directed more at the political failings of the minister rather than at abuse of discretion by the bureaucracy (see Day and Klein, 1987; Gregory, 1998). There may be means for the scrutiny of administrative actions, but the executive tends to dominate the process. For example, the British Parliament does have a mechanism for reviewing statutory instruments through a special Joint Committee, but the impact of this committee is very limited; its powers are confined to "drawing attention" in one house or the other to problems in an instrument. In some cases legislatures take it upon themselves to attempt to fill in the holes in the law in committee, but in most instances that legislative action is not available to the parliament.

The capacity of legislatures to enforce accountability is being severely threatened by administrative reforms that stress administrative "quality" and "performance" (Pollitt and Bouckaert, 2000; Aucoin and Heintzman, 2000). In these reforms accountability is directed more at a set of service standards and performance criteria than to political institutions, although the performance standards must be enforced through some legitimate means. Although devaluing traditional democratic accountability, these reforms have the virtue of directing attention away from exceptional abuses of discretion and more toward efficiency and effectiveness questions.

The Courts

An alternative restraint on bureaucratic discretion is the court system. This form of control is perhaps best developed in countries with well-developed systems of administrative law, but also may function in almost any setting (Craig, 1990; Gilboy, 1994). Even when there are strong constitutional premises about the supremacy of parliament, and the laws made in pursuance of acts of parliament, there may still be means of challenging the actual implementation of those laws. Also, in some political systems there are court-like institutions,

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5 Further, in general, the committee is not capable of setting its own agenda but has statutory instruments referred to it.
6 This style of accountability does have the virtue of focussing on the average performance of the bureaucracy rather than on the exceptional, but does little to address questions of improper use of delegated authority. Indeed, there are instances in which a performance orientation might welcome such abuses.
e.g. the Conseil d’Etat, responsible for assuring the legality of the decrees made by administration in pursuit of primary legislation (Massot and Giradot, 1999).

Except in cases when they are required to acquire pre-approval of regulations, or in which such practice is customary, the courts may have an even more difficult time functioning as a check on the abuse of discretion than does the legislature. In part this is because of the same problems of time and identifying the right cases that confront legislatures. The courts may have these problems even more intensely because they both tend to spend more time on each case and also generally wait for a case to be brought to them. Also, most court systems exercise a good deal of restraint in their decision-making, and tend to err on the side of assuming that government is acting properly. Finally, courts are generally even more ill-prepared to make decisions based on technical evidence than are legislatures (Sunstein, 1990), although they are attempting to develop means of gathering and interpreting evidence independent of the parties involved.

From the perspective of participation, the courts have the additional disadvantage of being the least participatory of the major institutions of government. With the exception of instruments such as amici briefs in the United States, and analogues in other Anglo-American systems, the courts attempt to insulate themselves from pressures, rather than to open themselves for external influences from interest groups or the public at large. The need to maintain the appearance, and the reality, of judicial independence means that the courts function in a more remote manner than modern norms of democracy can find comfortable.

The Executive Itself

Finally, the executive branch of government itself often will want to exercise some control over its own bureaucracy. Given that we know that ministers may encounter substantial difficulties in controlling their own departments (see Rose, 1976 for a thorough discussion), there may be some attempts to centralize control over administrative rulemaking with central agencies or with the chief executive’s office. There are at least two issues involved in executive oversight of rulemaking within its own departments and agencies. One is the content of the rules being made and their policy implications, most importantly their consistency with the policy goals of the government of the day. The other issue is an assessment of the costs that these agency decisions impose on the economy, and the alternatives to direct regulation.

The review of the substance of administration is particularly important for our concern with the capacity to control bureaucratic discretion. Political executives have attempted to ensure that these decisions do indeed conform to their programs. In the United States, for example, going back at least until the time of the Nixon Administration, presidents have sought to exercise greater control over the nature of federal regulations. The Office of Management and Budget has reviewed regulations for both cost and consistency with the program of the President (Bruff, 1989). President Carter created a "regulatory council" of the most active issuers of regulations as a means of coordinating their activity. Again, one might expect this type of control over discretion to be of special importance in a system such as the United States that does not have a concept of collective responsibility.

7For a discussion of the development of doctrines on the role of close judicial oversight in administrative rulemaking in the United States see Gormley (1989). The basic concept is that so long as a bureaucratic agency does not act in an "arbitrary and capricious manner" it has the right to do very much what it will in interpreting legislation. Even after the adoption of the "hard look" doctrine there is still a tendency to defer to agency expertise.
The review of costs of regulation has become even more important as skepticism about government has produced demands for greater control over regulations and their impacts. This concern was especially evident during the Reagan administration in the United States. After taking office the Reagan White House imposed a sixty-day moratorium on new regulations, and then created the Vice President’s Task Force on Regulatory Relief. This basic concern with the review of administrative rulemaking continued into the Clinton Administration as a part of the National Performance Review. This review looked at the structure and processes of organizations as well as their putative effect on the economy, the general concern of most conservatives.\(^8\)

As with the example cited above, reviews within the executive itself may be as much concerned with the costs and political reliability of the regulations as with the exercise of discretion per se, or the technical quality of the rules being made. These are not insignificant issues, but are not the concerns that we believe are most important for understanding administrative rulemaking in democracy. Again, this type of conflict may be more important when executive and legislature are more autonomous than is true in most parliamentary regimes.

**Discretion and Deliberation: Problems and Barriers**

A primary concern of this paper is the effect that involving the public, and especially involving them in a more deliberative manner, can have on bureaucratic discretion. This form of democracy does have very much of what Sartori (1987, 8) referred to the "pull of the ought", given that the idea of direct public involvement in making decisions is an important democratic ideal. As already noted, deliberation and involvement have become even more important, and there is a growing body of literature arguing for increased use of these more open, democratic processes for making decisions (see Dryzek, 1990; Benhabib, 1996).

That having been said, there are already various mechanisms available to involve the public in rulemaking. The Administrative Procedures Act of 1946 mandates opportunities for the public to participate in rulemaking, either formally or informally (Freedman, 1980; Shapiro, 1986). The participants in these processes are rarely average citizens, with interest groups more likely to have the resources required for effective participation. In the Scandinavian countries the corporate-pluralist systems of decision-making permit substantial interest group influence (Christensen, 1998), and the French process also involves a network of committees and interests in decisions.

More recently, mechanisms for negotiated rulemaking have been developed in the United States (Harter, 1992; Berry, Portney and Thompson, 1989), and to some degree in other countries. As well as permitting interest groups to have an input into the rulemaking process, negotiated rulemaking also permits those groups actually to make the decisions through bargaining among themselves and with government. This system is, in many ways, an *ex ante* control of bureaucratic discretion. The bureaucracy is not given the opportunity of making a decision and then forcing other actors to challenge it if the decision is perceived to be an abuse of power. Rather, it can only act once agreement has been reached among the affected parties.

The development of mechanisms for involving at least the organized public in administrative rulemaking represents not only a political reality; it also reflects the evolution of theoretical arguments about the nature of administrative law. The "traditional" model of administrative law was that administrative justice involved very tight controls over discretion

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\(^8\)The Center for the Study of American Business at Washington University, St. Louis has attempted to calculate the economic impacts of regulation for the past several decades.
and permitted minimal delegation of the authority of the legislature to make law (see Landis, 1938 as a classic example). This model assumed that the legislature had sufficient expertise if it wanted to use it, and that administrative agencies should and would be content to be the "transmission belts" of the legislature’s decisions.

An intermediate step in the development of doctrines in delegation and administrative discretion is represented by Kenneth Culp Davis’s discussion of discretion (1971). Davis recognized the importance of delegation and discretion in making rules, but was still concerned about the need for ensuring that the rules being made conformed with Congressional intentions. He thus emphasized the need for a single arbiter to make determinations about the appropriate use of discretion, and also clearer administrative (but not necessarily legislative) standards for the exercise of discretion.9

The doctrine that emerged in response to Davis and his emphasis on the importance of delegation, albeit controlled delegation, was that administrative law could only be effective if it permitted the representation of interests (Stewart, 1975). In this view administrative agencies are not by nature neutral conveyors for the wishes of the legislature but rather have their own institutional interests and values. Likewise, legislation is rarely so clear that there is no room for interpretation. Therefore, agencies are constantly involved in making decisions and therefore representation of the rights and interests of the parties involved is required. This more realist conception of the behavior of administration then involves bringing political activity more directly into the implementation process.

Although there are mechanisms for involving the public in the form of interest groups, there are relatively fewer means for involving the general public in the process. This is a more difficult political process, given that the identification of the actors who should be involved is more difficult, and those actors may have less interest in investing their time and energy in the process than would the representatives of organized interests. This may be especially true given that to be effective these processes require a substantial investment of time since, in the prevailing conceptions of deliberative democracy, the involvement would continue until the participants reach an agreement.

These general reservations notwithstanding, there is an emerging interest in "collaborative governance" in the field of administrative law and rulemaking, with mechanisms for processes approaching deliberation beginning to be considered and implemented (Freeman, 1997; Kelman, 1992). One clear example is negotiated rulemaking in the United States (Coglianese, 1997), and similar processes that have been institutionalized in Canada. The idea here is to involve the affected interests directly in the process of writing regulations, rather than merely responding to the initiatives put forward by government agencies. What motivates such initiatives is the recognition that traditional means of public involvement in administrative decision-making, such as public hearings, are ill-equipped to promote "authentic" participation.10

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9 For a critique of Davis’s somewhat self-contradictory approach, see Baldwin (1995, 21-33).

10 According to one group of scholars, unauthentic public participation in administrative decision-making is characterized by a conflictual style of interaction. Administrators, acting as inaccessible technical experts and managers confronted with ill-informed citizens, seek public input only once the agenda is set and important decisions are made. Citizens may be consulted, but administrators make the decisions. Authentic participation, in contrast, is a collaborative endeavor during which administrators acting as technical advisers early in the process seek input from citizens regarded as equals. Authentic participation offers all concerned an equal opportunity to deliberate and influence the outcome. See King, Feltey, and O’Neill Susel (1998,
Proponents of collaborative governance have therefore sought to design and institutionalize mechanisms that encourage public deliberation in order to create more authentic public participation in administrative rulemaking.

Applying the idea of deliberative democracy to administrative rulemaking requires revising the theory as it is usually discussed by political theorists. Most theorists of deliberative democracy favor a model of "decentered" public deliberation, which emphasizes freewheeling debate on matters of public concern among the citizenry. Civic and voluntary associations, seen as mediating between citizens and the state, then transmit the results of public deliberation into the state decision-making apparatus (Cogen and Rogers, 1993). This notion of deliberative democracy is too general to address the problem of administrative accountability. Rather than look to elected officials for the democratic control of public administration, it looks to citizens and voluntary associations to hold government agencies accountable via the influence of public opinion. Doubtless public opinion sometimes guides the actions of politicians interested in their reelection, particularly on salient issues (Geer, 1996). But we contend it is far more difficult to ensure the democratic accountability of bureaucratic agencies, which lack this electoral connection. Moreover, it is in policy formulation and implementation processes at the administrative level, hidden from public view, that organized interest groups are best able to use their influence to obtain decisions that benefit private rather than common interests. Holding bureaucracies accountable to democratic norms, we believe, requires more structured, issue-specific forms of interaction between administrators and the publics affected by or concerned about agency decisions than the model of decentered deliberation provides (see Fraser, 1992).

A promising proposal along these lines is James Bohman’s call for new forms of bureaucratic organization that are consistent with deliberation so as to make "administrative and bureaucratic structures more deliberative and democratic" (Bohman, 1996, 182). According to Bohman, each bureaucratic organization "needs to form its own political public sphere—a sphere at least as extensive as the one formed around legislative bodies and processes" (Bohman, 1996, 188). He envisions what he calls a "truly public form of administration" where administrators are held accountable through "public impact statements" that would explain how the public reasons expressed by those affected were taken up in the decision-making process (Bohman, 1996, 190). Note that such reforms would not result in administrative agencies simply handing government authority over to interest groups. Agencies would continue to be bound by the public interest provisions of authorizing legislation, but they would not be permitted to define general interests independently of the wishes of affected publics as expressed in a process of democratic deliberation.

Before discussing the feasibility of enhancing public deliberation in administrative rulemaking, let us clarify briefly what public deliberation adds to existing processes of interest representation. Deliberative democracy emphasizes the public give-and-take of reasons as the means by which citizens search for jointly supported solutions to political, economic, and social problems. Deliberative democracy offers an alternative to the prevailing conception of democracy wherein public policy is the result of aggregating individuals’ or groups’ private preferences as expressed in elections. Proponents of deliberative democracy tend to view public deliberation as an antidote to the perceived shortcomings of aggregative decision-making. Thus, deliberation is believed to foster trust in government because officials cannot hide behind...
the veil of expertise but must defend their proposals with reasons that are acceptable to the
public. Decisions justified with a view to publicly revealed and accepted standards of fairness
and equity are believed to enjoy greater legitimacy than decisions reached through the push and
pull of interest group politics that characterizes decision-making in aggregative democracy. A
further benefit attributed to public deliberation is that the participants may gradually come to
shift perspectives as they reason with each other on matters of public concern. Listening to the
positions of others and seeking to understand their perspectives, as well as being prepared to
adjust one’s own preferences in response to deliberative processes of joint social learning, are
basic requirements for creating an inclusive democratic polity (Kelly 1998). In short, the use of
public reason is thought to create a more cooperative social atmosphere that enables citizens to
see their situations, as well as the problems that require political solutions, as shared. Of course,
affirming social interdependencies and the importance of social learning does not ensure that
joint solutions will be found. Given the contentiousness of politics in pluralist societies,
deadlock may be no less likely than consensus. However, deliberative democracy’s emphasis on
public reason restores the values of social cooperation and joint problem-solving to a public
administration obsessed with maximizing economic efficiency in government and society
(Ventriss, 1997).

What are the prospects for creating administrative rulemaking practices that incorporate
principles of deliberative democracy? There are several barriers to creating a truly deliberative
process in administrative rulemaking. One of these is the need, if the process is to be truly
democratic rather than merely an arrangement whereby government approves private deals, to
involve groups that are not sufficiently well-organized to be able to participate in usual processes
of negotiation. There are already a number of viable institutional mechanisms in place that
involve organized interests, notably corporatist and corporate pluralist systems in Northern
Europe (Schmitter, 1974; Rokkan, 1966), or the "cooperative pluralism" argued to exist in some
policy domains in the United States (McFarland, 1993; Weber, 1998). The question therefore
becomes one of ensuring that the processes also accommodate all segments of society that are
affected by the policy, even if they ordinarily are less capable of articulating their interests. This
is, of course, a difficult process in any policy-making system legitimating itself at least in part
through interest representation, and is no less a problem here (Mansbridge 1992). However, the
legitimacy of the process and any resulting decisions depends on its being as inclusive as
possible.

Associated with this criterion of involving groups that may be inadequately organized to
participate in most conventional processes is the idea that excluding groups, or individuals, from
involvement should be difficult. Many negotiated rulemaking processes and even corporate-
pluralist arrangements impose restrictive criteria, analogous to the concept of "standing" in
Anglo-American law. In a deliberative process, on the other hand, there is an assumption that
almost anyone should be given the right to be involved as a matter of citizenship. This makes for
potentially messy decision processes but also makes for a more democratic form of interest
representation in government.¹³

¹³The literature on representative bureaucracy (Selden, 1996; Kelly, 1998) addresses similar
concerns. It aims to reconcile democracy and bureaucracy through creating administrative
agencies whose personnel mirrors the population whom they are intended to serve. The
argument is that citizens’ symbolic concerns and substantive interests will be better represented
by a bureaucracy whose employees mirror the perspectives and social positions of the citizenry.
Having more women and racial minorities serve in the public bureaucracy is a promising strategy
A second barrier to the effective utilization of a deliberative mechanism for rulemaking is the need to structure a pattern of continuous interaction among the interested parties, rather than the "one-off" interactions that characterize mechanisms, such as the notice-and-comment procedures and public hearings, typical of American rulemaking. This continuing interaction is necessary so that the participants can shape the agenda rather than merely respond to the propositions put forward by government agencies. If the condition above concerning broadening the base of participation is met, however, this condition may be more difficult to achieve, given that relatively few "ordinary citizens" will have the time and the inclination to engage in extended deliberative processes over rulemaking. As Freeman (1997, 27) has written:

Instead of inviting responses to the agency’s proposed solutions, which are themselves offered to fix preconceived problems, institutionalized participation involves opportunities to formulate questions as well as potential answers....

Thus, there may be a trade-off among the criteria of deliberation being pursued in controlling administrative discretion. The selection of which criterion to emphasize may depend upon the nature of the policy itself. For example, if there is an environmental rule concerning hazardous waste disposal that may affect a neighborhood of relatively poor and ill-organized people then it may be appropriate the emphasize the inclusiveness of the process. In contrast, if there are multiple actors of relatively equal resources involved with an agency with a clear policy agenda, then it may be appropriate to emphasize the need for more continuous interactions.

A third condition to be met would be that all participants may exercise a veto of last resort. Most styles of decision-making are basically majoritarian, or they provide one player (usually the agency) with a veto over any outcomes. While some type of majority vote may still be necessary following a process of deliberation, giving each participant a veto would push decision-making toward a more consensual model. The point here is that for deliberation to be truly democratic there must be some degree of equality among the actors. Thus, participants once accorded the opportunity to participate must also have the capacity to bargain for an outcome that they can accept. This may make the policy-making process much longer than it is now, but may also improve the quality of the decisions. Further, by limiting potential challenges at the implementation stage the total time required for the process may not be increased by very much (see Coglianese, 1997).

Finally, the process discussed here can not be seen to be legitimate unless it is decisive. By "decisive" we do not mean that administrators cease to be active participants in the proceedings, but that they are obliged to act on the input they have received. The traditional way of involving interests or individuals in administrative rulemaking or other devices to control bureaucratic discretion provides them with access, but does not involve decisions. The consensual norms discussed above go some distance to ensuring that the process is decisive, but it must be made clear to participants that they are actually making rules rather than offering

for improving bureaucratic responsiveness to citizens’ needs. Although we agree that a public bureaucracy that resembles the citizenry in terms of gender, race, and class is preferable to one that does not, we are wary to abandon the idea that administrative agencies will tend to develop interests of their own, no matter how much they might look like the general populace demographically. The professional training and values of administrators are likely to come between even the most representative bureaucracies and the communities they serve. Therefore, the democratic control of bureaucratic discretion will always require opportunities for administrators and citizens to share in joint discussion and decision-making.
advice and opinion. Not only should this enhance participation, but it should also enhance the responsibility of the individuals involved, given that they will be making law rather than simply voicing an opinion or defending an interest.

This notion of responsible participation is crucial because attempts at collaborative governance in administrative rulemaking place public power into private hands. Replacing public with private bureaucratic discretion with no gain for democratic accountability is an obvious pitfall here. It can be largely avoided, however, if equal weight is given to all the conditions we have discussed. Maximizing the inclusiveness of the rulemaking process, stressing the ongoing nature of relationships among the affected parties, harnessing consensual norms of discussion and decision-making to protect everyone’s vital concerns, and using the results of deliberation as a blueprint for rulemaking should go a long way toward placing democratic constraints on administrative power.

Meeting these four broad criteria for deliberation is a difficult task for any administrative agency, particularly since doing so will probably also increase its own decision-making time and costs immensely. Still, we contend that as is true for corporatist arrangements in European countries the extra time spent at the policy formulation stage may be recaptured when the rules are implemented. Not only are there likely to be fewer formal challenges to the rules in the courts, but also there is likely to be more willingness on the part of the affected parties to implement the rules. In short, the rules may be considered more legitimate.

Not only may the rules be considered more legitimate on procedural grounds, they may also be better constructed. One of the major concerns about administrative rulemaking that we are addressing here is substantive more than it is procedural. That is, what is the range of evidence that is being considered when rules are being made. Further, are the rules being adopted as "good" in substantive terms as they might be were the full range of evidence available to decision-makers? As Majone (1989; see also Greenwood, 1984) has argued, one important characteristic of contemporary societies is that expertise is now less concentrated than it was even a few years ago. The development of an increasing number of interest groups in every policy area, the expansion of think thanks, university experts, the Internet, and the spread of other sources of information all suggest that government departments can not claim to have the only, or the best, information on policy issues.

This dispersion of expertise also implies the desirability of decentralizing the sources of information taken into account in administrative rulemaking. The utility of including more sources of information is especially evident when there are not as yet in place mechanisms for opening the process to the public. Not only can rulemaking be more democratic, but it can also be substantively superior if a wider range of opinion and information is considered. Therefore, controlling bureaucratic discretion through public deliberation also may be a means of making

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14Even in the less demanding negotiated rulemaking described above there is a marked increase in the time required for decision-making. See Kerwin and Furlong (1992).

15This appeal to multiple sources of information may imply the adversarial epistemology common to the Anglo-American political style. The same logic holds, we believe, in more cooperationist systems and indeed corporate-pluralist arrangements, such as those argued to exist in Scandinavia, which may be one of the best means of including a range of material in deliberations (see Kelman, 1992). Ventriss (1997, 1055) notes the importance of this social knowledge transfer between citizens and administrators, which "refers to the direct exposure of the administrator to the unique knowledge of clients and the provision of a forum for public dialogue and open exchange of information of direct importance to the community."
government perform better, not just a means of promoting democracy and inclusion (Kelly 1994).

In short, constructing instruments that permit greater deliberation and greater involvement by the public is one alternative to the traditional forms of monitoring and controlling bureaucratic discretion. These participatory institutions may lack the institutional status of the other forms of controlling discretion, but they are more manifestly democratic, and also may be effective in involving interests and using information in ways not feasible in more formal institutions. This latter point, we believe, goes some way toward addressing the objection, voiced by Dryzek (1996) among others, that a state that would actually want to set up ambitious participatory institutions only exists in the imagination of some political theorists. To be sure, there is plenty of evidence to show that many administrators who conduct public involvement and consultation programs tend to view them as exercises in public relations, paying mere lip service to democratic ideals (see Aronson, 1993). However, we suggest that administrators will be more likely to give up some discretion in return for substantive gains, such as regulations that can be successfully implemented because they enjoy high levels of legitimacy.

Performance and Participation

We noted above that one of the major drives in contemporary administrative reform is to emphasize performance, and to invest a good deal of time and energy in devising and implementing a set of measures for administrative performance. This move may appear extremely technical and antithetical to the goal of advancing democratic control over the bureaucracy, but in many ways performance and participation can go hand in hand.

The argument is that to control the bureaucracy effectively the public needs information, and that often has been in short supply. The performance movement, on the other hand, requires organizations within the bureaucracy to develop and disseminate a great deal of information about their activities, and to compare their performance with that of other public organizations. The response to this information may be official, as when the Blair government in the United Kingdom promises to "name and shame" failing organizations. When this information is coupled with participatory opportunities, however, it can be used to exercise more popular control (Regeringen, n. d.).

As well as shifting the emphasis in accountability away from individual cases of maladministration, although these certainly remain a significant question, the performance model emphasizes overall performance of the organization or program. Therefore, there is greater capability of mobilizing groups of affected individuals—parents, patients, consumers of all sorts—around the question of whether the public services being provided are the right ones, and if so, are they being provided in the best manner possible? This may then be a ways of addressing some of the mobilization and identification problems mentioned above as barriers to effective deliberation.

Summary

Administrative discretion is both a strength and a weakness of contemporary political systems. On the one hand, governments could not govern without the capacity to fill in legislation with detailed administrative regulations, and those regulations generally are formed in an effective and (increasingly) participatory manner. Further, these regulations tend to reflect a good deal more substantive information about the subjects being regulated than would most legislation coming from the legislature or decisions reached by the courts.
The weakness of using discretion in rulemaking is that there is often a problem with the legitimacy of these rules, even when they are made in conformity with all the legal requirements of the country in question. Bureaucracies have a less than positive image in most industrialized democracies (Norris, 1999), and it is often assumed that their decisions are made to aggrandize their own institutional interests, or to serve the interests of "special interests" (usually meaning an interest of some group other than the one making the complaint), rather than to serve the public. Thus, in order to make this form of rulemaking more legitimate, effective means of oversight and participation for the public as a whole are required.

We have argued that many of the existing, familiar means of oversight are not as effective as they once may have been. This is true in large part because of the volume and complexity of rulemaking activity. In addition, the demands of the public in most democracies for more opportunities for effective participation mean that rulemaking that is done without the opportunity for the public to involve itself is suspect. While agencies in many countries have provided such opportunities for some time, such as "notice and comment" in the United States, they do not meet the needs of populations interested in more immediate impacts of decisions taken by bureaucracies. The deliberative turn in thinking about participation, especially within public administration, may provide the public with opportunities for greater direct oversight, and perhaps also greater legitimacy for the rules adopted.
References:


Regeringen (n. d.) *En offentlig sektor pa borgerne's praemisser* (Kobenhavn: Regeringen).


