



Chapter VII

Bureaucratic Discretion and Deliberative Democracy

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ABSTRACT

Administrative discretion is both a strength and a weakness of contemporary political systems. Governments could not govern without the capacity to fill in legislation with detailed administrative regulations. Further, these regulations tend to reflect far 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 the lack of legitimacy of these rules. Bureaucracies have a less than positive image in most industrialized democracies, and it is often assumed that their decisions are made to aggrandize their own institutional interests, or to serve “special interests” rather than the public. Thus, in order to make rulemaking more legitimate, effective means of oversight and participation for the public as a whole are required. We argue that many of the existing means of oversight are not as effective as

they once may have been. This is true largely 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. 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.

INTRODUCTION

Modern democracies appear to have lost many of the features that might permit them to 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 & Shugart, 1998), appear incapable of making all the decisions 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 rule making 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 rule making, but so long as that peg exists, they are able to exercise substantial discretion.

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 rule making 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 businesses.

We argue for expanding the use of deliberatively democratic methods of public administration on democratic and technical grounds. The monitoring and control of bureaucratic discretion in rule making 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 are increasingly 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 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.

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