

Public Choice, Public Law and Public Policy

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Public choice, public law, and public policy analysis all help to illuminate the operation of the regulatory welfare state. These approaches are sometimes complementary and sometimes conflicting. My aim is to highlight these interrelationships and to encourage public choice scholars to explore them further. That interdisciplinary enterprise is more advanced in the United States than elsewhere in the world, but similar problem and challenges exist in all modern states. Research needs to expand beyond the special case of the US.

Administrative law imposes constraints on authority delegated to government agencies, and it gives the courts a tool to monitor the exercise of that authority. All representative democracies face the need to balance democratic accountability against the competent implementation of complex statutes. The legal manifestations may differ, but the underlying tension remains the same. Even authoritarian rulers with no prospect of electoral defeat often create structures of bureaucratic accountability and review to maintain popular legitimacy.

The rules governing the bureaucracy are enacted by politicians. But politicians may neither value technical facility nor care for transparent administration. In seeking to understand and critique existing administrative processes, one must try to understand what motivated politicians to put them in place. One place to start is with work in public choice that models the relationships between the branches of government. Most of that

work is purely positive. It seeks to explain, rather than to evaluate, existing patterns of public law. However, one can combine such explanations of what the law *is* with recommendations for what it *ought* to be.

Public finance economics and public choice are deeply entwined with the field of administrative law. Economics provides many of the normative rationales for government intervention in society; rational choice models seek to explain both the substantive content of regulations and the institutions of delegation and oversight. A central tension, then, is the contrasting roles of economics in justifying policies, on the one hand, and in explaining how self-interest determines the behavior of government actors, on the other. Policies consistent with social welfare maximization will not necessarily be selected by a political system dominated by self-interested individuals. Nevertheless, there may be cases where political incentives and social welfare converge. A government program that can be *explained* through positive political economy models may still be *justified* on normative grounds.

The tensions between economics and political science go beyond the contrast between normative prescriptions and positive predictions. They are embedded in the contrasting norms of democracy and public policy economics. Most public policy analysts trained in economics espouse the cost-benefit test where policies are chosen to maximize net benefits. The aim is to avoid waste and inefficiency and to maximize the size of the social pie.¹ Even before we move to the realm of practice, however, tensions arise between policy analysis and democratic theory: first, cost-benefit analysis does not incorporate concerns for distributive justice or other non-efficiency values, and second,

there is an inconsistency between even an idealized democracy and the cost-benefit test. I consider each in turn.

First, in its pure form the cost-benefit test ignores the distribution of the benefits and only asks if it would be *possible* for the gainers to compensate the losers. Actual compensation is not required. This leaves open questions about the fairness of the distribution of benefits and costs—questions that cannot be answered by economics standing alone.² Public policy analysts argue for the use of cost-benefit analysis in the design of regulations and government programs whose aim is to improve efficiency; the state should then incorporate principles of distributive justice into its tax, subsidy and spending levels. On this view, cost-benefit analysis is an input into the subsequent political process that sets policy, not the decisive determinant of policy.³ This is a fine response in principle, but, in reality, policy choices cannot be so neatly cabined.

Second, ideals of democracy and cost-benefit analysis may clash.⁴ Public deliberation over both means and ends is an important aspect of democracy that cost-benefit analysis simply assumes away. Cost-benefit analysis takes preferences over options as given, even though, in practice, they may be difficult for citizens to articulate clearly. Furthermore, even when preferences are precise and stable, direct democracy and policy analysis differ in the way they aggregate individual rankings into a social choice. Under cost-benefit analysis preferences are weighted by willingness-to-pay. By contrast, under majority rule, preferences are not weighted. Everyone is treated equally—each person has a single vote, and the option with the most votes wins. (More precisely, the winning option beats every other option in a series of pair-wise votes.) Frequently, majority rule does not produce a definitive winning outcome but instead

cycles over a number of options. This creates real difficulties, but here I wish to emphasize that even when majority rule produces a clear winner, that winner may not be the option recommended by cost-benefit analysis. The reason is simple. The majority winner may be an option where the losers have very high dollar losses that outweigh the gains to the winners.

These basic tensions between democratic values and economic efficiency should be kept in mind in thinking through the contributions of public choice to public law. Although much public choice research is purely positive, it is important to recognize the underlying and, sometimes implicit, normative positions that inform the analysis. I consider three areas of research: delegation and oversight by Congress, policymaking inside agencies, and judicial review of agency action. These categories track the organization of a forthcoming book of collected papers that I am editing entitled the *Economics of Administrative Law* (Edward Elgar 2007). Then, I present a proposal for enhanced judicial review of regulatory rulemaking in the United States and go one to consider how it might be implemented in European parliamentary systems. I conclude with some suggestions for future research.

The Political Economy of Delegation

First off, why are legislatures willing to delegate policymaking authority to agencies, and when they do delegate, what form does delegation take? Research that attempts to answer these questions often begins with a bow to the normative justifications for delegation to agencies—agency technical expertise, the legislators' lack of time, the value of removing implementation decisions from overtly political fora.

The next step, however, is the claim that these benefits are not sufficient to explain why legislators voluntarily cede power to agencies and give an oversight role to courts.

Statutes that both delegate power and seek to constrain agency action are worthwhile to today's legislators only if statutes are difficult to change. They depend upon the frictions inherent in the law making process. In the United States, laws, once enacted, having staying power, especially in situations of divided government. Statutes are likely to be stickier in the United States than in unitary parliamentary systems—there are simply more veto points to overcome in the US.⁵ In particular, it is worthwhile for Congress to enact procedural requirements that will survive the coalition that passed the law.

Delegation: The public choice literature suggests four main reasons for delegation. First, building on David Mayhew's (1974) seminal work on the US Congress, Morris Fiorina and Roger Noll (1978) argue that legislators satisfy their constituents, not so much by position taking on broad legislative initiatives, as by doing individual favors for voters. Thus, they design laws with opportunities for to aid constituents or campaign contributors. After the law is on the books, legislators can earn points with constituents by intervening in agency processes. Legislators write complex laws that will require them to come to the aid of citizens and local businesses.⁶

According to James Q. Wilson (1980) a second reason for delegation is the possibility of passing on difficult choices to bureaucrats while claiming credit for the broadly popular aspects of policy. Thus legislators will delegate the implementation of policies with concentrated costs and diffuse benefits so that agencies must make the

hard choices. Conversely, when benefits are concentrated and costs are diffuse, Congress will want to specify the beneficiaries itself and claim credit.⁷

Third, Fiorina (1986) hypothesizes that legislators' attitudes toward risk might affect the form of delegation—to an agency or directly to the courts. He claims that Congress expects that a court-dominated process will be an unbiased but uncertain reflection of Congressional intent and that agency implementation will be biased.⁸

Fourth, the degree of delegation may depend upon whether or not the interests of the executive and legislature are aligned. David Epstein and Sharyn O'Halloran (1994) model a situation where bureaucratic discretion is greater under unified government. The basic logic is that Congress is willing to delegate more power the less it thinks the exercise of that power will diverge from its own preferences. If some agencies are, like the Federal Trade Commission, independent of direct presidential control, the legislature may prefer to give such agencies more discretion.⁹ However, in the United States, the president has veto power that can be overridden only by a two-thirds vote in each house. This gives the president bargaining power.¹⁰ B. Dan Wood and John Bohte (2004) show empirically that agency design will be affected both by an interest in tying the hands of future unfriendly coalitions and by the need to compromise in the present. They test their theoretical predictions with a study of the initial design of 141 federal administrative agencies created legislatively between 1879 and 1988.¹¹

Monitoring: Of course, even when Congress delegates implementation of a law to an agency, it continues to monitor agency behavior and has many oversight tools—from holding hearings, to limiting budgetary appropriations, to threatening to amend statutes. Matthew D. McCubbins and Thomas Schwartz (1984) contrast two types of

oversight: “police patrols” and “fire alarms”. The former involves members of Congress in direct oversight. Under the latter, private individuals and groups carry out the monitoring. McCubbins collaborated with Roger Noll and Barry Weingast (1987) to argue that the US Administrative Procedures Act is a prime example of “fire alarm” oversight.¹² Under the APA the legislature “stacks the deck” in favor of the groups favored by the enacting coalition. The APA’s requirements for notice, a hearing, and reason-giving help assure third party participation and limit closed-door bureaucratic decision making. Even though the constraints are nominally procedural, they have substantive effects. Other statutes include procedures biased in favor of particular types of interest groups. Stacking the deck is a response to future uncertainty. Instead of requiring close legislative control, the required procedures assure the enacting coalition that the agency will respond to changes in the preferences of those interests served by the legislation.

The deck stacking hypothesis is a bold and interesting thesis that has generated a range of critical responses. Jeffrey S. Hill and James E. Brazier (1991) detail the restrictive conditions under which it operates effectively and provide a number of case studies to back up their claims. According to them, *ex ante* controls only operate well when “(1) the enacting coalition provides the agency with clear guidance... ;(2) the enacting coalition has designed the structure and process requirements with the specific intention of maintaining agreements reached by the coalition; and (3) the courts provide a reliable mechanism for enforcing these ... requirements...” (ibid.: 374). In a similar vein, David Spence (1997, 1999) questions the ability of elected politicians to constrain the policy choices of agencies through structural and procedural means. His study of the

US Federal Energy Regulatory Commission shows that such controls had some effect, but that the actual impacts may not have been the ones intended by the original statutory drafters.¹³

The amount of agency discretion under a given statutory framework depends upon how tightly agencies are hemmed in by the statutes they must implement and by the institutional structure of the government. If an agency makes choices that diverge too far from the preferences of lawmakers, it will invite the politicians to amend the law. This point is illustrated by John Ferejohn and Charles Shipan (1990) using a simple one-dimensional model of the political landscape. They show how an agency, operating under an existing statute, can strategically pick a policy between its own preferred choice and that of the oversight committee so that the committee will take no action. Similarly, the possibility of a presidential veto constrains the legislature and may give the agency more leeway. This simple model captures part of the dynamic among the branches of government. More nuance is provided by B. Dan Wood and Richard W. Waterman (1993) who model the dynamic nature of political-bureaucratic relationships and test their theory using programs of the US Environmental Protection Agency (EPA).

If agencies have discretion after the passage of a new statute, then that fact ought to affect the design of statutes in the first place. Recognizing that possibility, Kathleen Bawn (1995) considers the way legislators balance political control versus expertise as they look to the future. Procedures that limit the ability of an agency to drift away from the aims of Congress may also mean that the agency is unresponsive to technical innovations and new data.¹⁴

Links to Older Capture Literature: This research is a counterweight to the older literature that stressed the independence of bureaucrats and the possibility of their capture by regulated entities able to offer private inducements or make persuasive arguments.¹⁵ This more recent literature demonstrates how legislators can draft statutes and engage in oversight to control agency actions. However, the insights of the older capture literature still have some purchase. In spite of Congressional oversight, agencies retain the power to act independently and may be swayed by interest groups. It is inherently difficult to establish controls to deal with the future uncertainties and with inconsistencies between the goals of the legislature and the goals of the executive.

For all its richness, however, those engaged in this scholarly debate have little to say about the substance of public policy. In most models there is a median voter in each house or committee who determines the institution's policy stance. Whether this reflects the wishes of the median voter in the electorate or the legislature's capture by wealthy campaign donors is not the subject of analysis.

Bureaucracy and the President

Given delegation to an agency, the executive branch and the independent agencies make policy under their statutory mandates. James T. Hamilton and Christopher H. Schroeder (1994) provide a counterweight to the line of research that stresses the primacy of the legislature. Following the lead of Willam Niskanen (1971), they concentrate on the way agencies strategically use their discretion over procedures to undercut Congressional control of substantive policy. Given a choice, agencies will often select informal techniques that lack the legal force of rules promulgated under

APA procedures. The authors support their claims with an empirical study of EPA actions under the Resource Conservation and Recovery Act.

Interest groups attempt to influence agency action. Agency officials might heed the arguments of interest groups because they are convinced of their merit or for reasons of politics or personal interest. S. R. Furlong and C. M. Kerwin (1992, 2005), and J. W. Yackee and S. W. Yackee (2006) document the continued importance of interest groups in the rulemaking processes in the United States. This confirms the McCubbins and Schwartz emphasis on “fire alarm” oversight but also suggests the difficulty of assuring Congressional control.

How should one evaluate the benefits of delegation to agencies? One way to do this is to bring in the preferences of voters, who have been largely ignored in the public choice literature on delegation. Jerry Mashaw (1985) argues that voters may favor delegation because of the President’s accountability to a national constituency. Mashaw’s insight is echoed by David Spence and Frank Cross (2000) who argue that delegation is often a route to more effective policy. Agencies are not always more subject to capture than the lawmakers. Delegation permits the use of expertise, favors specialization, encourages professional distance from politics, permits decisions to be tailored to diverse conditions throughout the country, and leads to procedures that are open to public participation.

Economists have been active critics of existing regulatory programs when they fail to pass cost/benefit tests. This work has spurred calls for reform that concentrate on the use of better analysis inside agencies and on reformed statutes.¹⁶ Some have suggested special science courts or other types of independent reviews. Stephen Breyer

(1993), for example, urges the creation of a separate expert agency with the mission of rationalizing regulatory policy across programs that regulate risk. Bruce Ackerman (2000: 688-714) recommends the creation of an integrity branch, concerned with transparency and limiting corruption, and a regulatory branch insulated from day to day political influences but required to justify its actions publicly.

However, those urging greater reliance on economic criteria need to recognize that these approaches can themselves be used as tools to obtain political advantage. In particular, recent US presidents have instituted White House review of regulations under cost-benefit criteria as a way of controlling the content of major regulations produced by executive branch agencies.¹⁷ The use of economic analysis as a means of centralizing control was pioneered in the US by Robert McNamara during his tenure as US Secretary of Defense. He borrowed the techniques used by the Army Corps of Engineers to justify dam building and applied them to Defense Department policies. Eventually, President Lyndon Johnson expanded the reach of cost-benefit analysis to the other agencies by creating policy analysis groups throughout the executive that reported directly to their respective secretaries.¹⁸ These groups were retained by subsequent administrations and were eventually complemented by the White House Office of Information and Regulatory Affairs (OIRA). OIRA and a series of Executive Orders require executive branch agencies to carry out cost-benefit analyses for major rules and have the effect of strengthening the President's hand in the promulgation of regulations.

If cost-benefit criteria are applied by an office that reports to the President, the tool, which appears neutral on its face, can be manipulated for political ends. This is possible because many judgment calls must be made in any analysis. Seldom will there

be a single “right” answer that anyone trained in the technique will accept. For example, the choice of a discount rate and proper way to monetize morbidity and mortality are both fraught with controversy even among those committed to the method.¹⁹

My own view, discussed more fully below, is that cost-benefit criteria should be used as a default criterion for regulations designed to improve the efficiency of the economy, subject to override by statutory mandates and to constitutional limits.²⁰ In spite of the potential inconsistency between democratic choice and cost-benefit analysis, such a background norm would serve to limit agency capture by narrow interests. Congress would be able to override the norm with explicit statutory language, but non-transparent efforts to induce agencies to benefit narrow interests could not be implemented.

Cost-benefit analysis and its sisters, risk assessment and cost-effectiveness analysis, are universalizing techniques that cut across substantive fields and provide a way to compare programs and allocate funds using uniform criteria. In a Congress with strong substantive committees, this is unlikely to be a favored outcome. Thus, the rational choice approach to legislative studies suggests that Congress will not support a generalized imposition of cost-benefit tests unless their own preferences are both very far from those of the executive and also close to the conclusions of the cost-benefit test. For example, during the Clinton Administration under divided government, members of Congress introduced several bills to mandate cost-benefit analysis and other related techniques for regulatory analysis.²¹

Judicial Review

The final piece of the administrative law and policy puzzle is the judiciary. Much of the positive political theory literature assumes that judges have policy preferences that they wish to further. In the simplest versions, these preferences are in the same one-dimensional space as those of the legislature and the executive. These models have the same static strategic form as those dealing with executive-legislative relations: judges make choices that are as close as possible to their own preferences subject to the threat of being overruled by statute.²² Other work tries to explain why Congress delegates oversight to the courts. According to William Landes and Richard Posner (1975), Congress does this so that courts will ratify the original statutory deal. There is obviously some tension between the view of courts as carrying out oversight functions for Congress and courts as composed of judges with their own policy preferences which may differ from those of the enacting Congress.

To explore these tensions, I begin with a specific American case, *Chevron, U. S. A., Inc. v. National Resources Defense Council*, 467 U. S. 837 (1984). Consistent with the Landes and Posner view, the decision holds that courts should be sure that agencies have followed Congressional intent. However, departing from Landes and Posner, it goes on to hold that if the intent is unclear, courts should be deferential to reasonable agency interpretations of their statutory mandates. Writing soon after the decision, however, Justice (then Judge) Stephen Breyer (1986) argues against such a strict interpretation of the decision and at the same time urges that courts show more deference to agency expertise on policy matters. In contrast, William N. Eskridge, Jr., and John Ferejohn (1992) argue that aggressive judicial review of both law and policy is desirable to rein in agencies that have become too independent of the legislature. Thus,

for them, *Chevron*, to the extent it leads to more deference, is an unfortunate move in the wrong direction.²³

If *Chevron* was an effort to induce the courts to defer to agencies, it is a challenge to positive political economy. Why would judges tie their own hands when it comes to statutory interpretation? Linda R. Cohen and Matthew L. Spitzer (1994) explain the puzzle with a self-interest explanation that is contingent on the political configurations of the time. They claim that by the mid-1980s both the Supreme Court and the agencies had become more conservative than the lower courts. *Chevron* was a way for the Supreme Court to rein in the lower courts and give more leeway to agencies.²⁴

However, bureaucrats and political appointees are not passive participants. Rather, they can be expected to try to avoid reversal by the courts. Emerson Tiller and Pablo Spiller (1999) model situations in which agencies seek to avoid reversal of their decisions by courts. Agencies impede review, not just by picking policies that courts will accept,²⁵ but also by making review costly and difficult. For example, agencies might choose to make policy through case-by-case adjudication instead of rulemaking because the former will be harder to review.²⁶ According to Tiller and Spiller, judicial decisions based on the review of agency processes will be more likely to survive review compared with those based on statutory interpretation.²⁷

In most public choice models the courts are essentially lawless. The judges have one-dimensional policy preferences and try to satisfy them as well as they can. These preferences might be related to their view of the law and of the proper role of the courts in a democracy, but the models do not depend upon the nature of their preferences.

This is surely an impoverished view of judicial motivation.²⁸ A model in which judges show respect for precedent and for the language of legal texts would capture reality better. One issue is whether a simple measure of judicial ideology, such as the party of the president who nominated him or her, is sufficient to predict a judge's behavior. Even if this connection captures part of the judge's perspective, he or she may also have other, specifically legal, commitments such as a reluctance to overturn settled precedent, an unwillingness to dissent except in extreme cases, an openness to legal arguments made by academics or in foreign courts, or a theory about the proper role of the courts in a democracy. The literature on judicial review would be furthered through systematic attempts to enrich the model of judicial action.

A Proposed New Role for Judges

In practice American judges do, in fact, take on oversight roles, by checking for consistency between agency rules and substantive regulatory statutes. The legislative process often produces vague statutory language. This leaves agencies and courts with interpretative challenges. A large but inconclusive academic literature and body of judicial opinions deal with this issue and the role of the so-called "canons" of statutory interpretation. I will not deal with this broad issue here except to say that justifications for the canonical status of these principles are often opaque and the canons themselves are internally inconsistent. I concentrate, instead, on one class of statutes: those that seek to correct market failures.

Even if a market failure justifies regulation, political pressures in the legislature may push drafters toward the provision of special interest benefits. When the government makes rules, it may favor concentrated groups. These biases suggest that

courts in reviewing agency action and in interpreting statutes should resist these tendencies. In the United States, special-interest legislation is not unconstitutional; but, given its failure to benefit the majority, efforts to benefit narrow groups should be stated in unambiguous statutory language before they are enforced by the courts. Thus, the courts should apply a substantive background norm when they review agency actions under such regulatory statutes. For statutes ostensibly designed to correct market failures and improve economic efficiency, courts could require agencies to use policy analytic methods. Cost-benefit analysis would be a default criterion for regulations designed to improve the efficiency of the economy, subject to override by clear statutory mandates and to constitutional limits. It is superior to an option familiar in Europe: “the precautionary principle” because that principle is not defined clearly enough to provide realistic policy guidance.²⁹ A presumption in favor of net benefit maximization increases the political costs for narrow groups which must obtain explicit statutory language in order to have their interests recognized by courts and agencies. Non-transparent efforts to induce agencies to benefit narrow interests could not be implemented.³⁰

Judicial review of agency policy analyses would replace tortured attempts by the US courts to derive legislative intent from legislative history. The words of the statute would be the courts’ fundamental guide; but the burden of proof would fall on anyone attempting to show a legislative intent not to maximize net benefits. The use of congressional speeches and committee reports to infer overall legislative intent is problematic; the former may be efforts to obtain publicity in the media; and the latter, negotiated deals lacking legislative or popular support.

If goals are not precisely specified in the statute and budgetary appropriations are limited, the agency has leeway to evaluate both benefits and costs. The judiciary should then insist that agencies make this evaluative effort, but the courts would not do the analysis themselves. Of course, cost-benefit analysis cannot always be carried out with precision because of information gaps and unquantifiable harms and benefits. Nevertheless, agencies should be required to make an effort to think through the available options. Agencies could argue that other techniques are more appropriate in particular cases. In some cases, a negotiated bargain between the affected interests may be most likely to produce the best result. In others the agency may create incentives for private individuals and firms to act without specifying the desired result in detail.

This proposal combines policy analysis and the insights of public choice to revamp judicial review of the administrative process. It requires a reorientation of the judicial role in favor of encouraging agencies to develop better analytic capabilities. Judges themselves would have to develop some basic competence in these techniques. The judicial role would still be strictly limited and would not impinge on the political and policymaking role of the other branches. Courts would introduce a rebuttable presumption in favor of net benefit maximization for those statutes where economic efficiency is a plausible justification for state action.

Comparative Administrative Law

One difficulty with this proposal as applied to the United States is that generalist judges usually have little training in the analytic methods of the social sciences. They may simply not be very skilled at determining if an agency has applied cost-benefit techniques effectively or if the underlying statute conflicts with policy analytic methods.

Of course, the Federal Court of Appeals for the District of Columbia Circuit does have a docket that is heavy with administrative law cases, but even that court must hear a wide range of disputes and only a few of the judges have a social science background. In some European countries the adoption of this proposal would be less at odds with traditional notions of the judicial role. Many European countries already have specialized courts that deal with public law matters. I am thinking of the administrative court system in Germany and Poland and the Council d'Etat in France. The notion of a specialized court for public law review is a commonplace; what is unfamiliar is the need for judges to know something about the analytic methods of the social sciences so that they can assess the appropriateness of their use by the bureaucracy. Furthermore, the rulemaking and norm setting process in European states is not often subject to judicial review. Administrative law most often deals with claims that the state has violated individual rights at the implementation stage.

The United States is unusual in having an Administrative Procedures Act that requires notice, hearings, and reason giving for rules and that permits judicial review of the rulemaking process. In Europe, most governments are not required to use popular, participatory procedures for the issuance of government rules and guidelines. Unlike the provisions of the US Administrative Procedures Act, they are not required to consult broadly or to issue reasoned decisions. Consultation concentrates on groups with economic or professional links—business associations, labor unions, and the chambers for medicine and law—and on statutory self-governments—both those with a geographic basis, such as municipalities, and those with an organizational basis, such as university bodies. Only in the area of labor-management relations are formal

consultation processes well institutionalized, and these have declined in legitimacy over time with the fall in union membership in many countries. Even when procedural rights exist, they are seldom judicially enforceable. European regulatory reformers are only beginning to think about how to incorporate pluralist elements into high-level government policy making in the executive. In this context, even without my additional proposal, the US model of bureaucrat-led notice and comment rulemaking with judicial review may provide some lessons and models.³¹ Given the continuing need to employ scientific expertise, reforms in the administrative process seem a more valuable direction for democratic reform than the increased use of directly democratic processes such as referenda.³²

The most comprehensive European experiments in public participation are occurring at the Commission of the European Union (EU) in response to criticism of the EU's "democracy deficit".³³ The Commission has also pushed for more participatory procedures in the member states, especially during the accession process for Eastern European countries.³⁴ Francesca Bignami (2004, 2006) outlines three stages. First, beginning in the 1970s, the Commission held hearings when it imposed costs on individuals or firms. Next, in the 1990s, Community institutions began to operate with more transparency. Third, at present, there is an ongoing debate about permitting outsiders to participate in Community policymaking processes. Bignami notes the clashing traditions in member states regarding the legitimacy of representation outside of political parties and elections. Without a strong, directly elected executive, Bignami worries that American-style participation would operate without checks and could be taken over by narrow interests. She suggests that in the EU context a reformed "old-

fashioned European functional participation” could play a constructive role. To my mind, the risk of that strategy is the questionable legitimacy of some of these functional groups—the most obvious being the inability of labor unions to represent the growing number of workers who are not union members.³⁵ An alternative, which can complement strengthened public participation in rulemaking, is more active review by the European Court of Justice.³⁶

Some American scholars, however, argue that the US model of broad-based public participation under notice and comment rulemaking is too costly and time consuming and should not be a model for Europe. For example, Terry Moe and Michael Caldwell (1994) contrast the United States with Westminster democracies such as the United Kingdom. They argue that the political incentives to impose procedural constraints on rulemaking in presidential systems do not exist in unitary parliamentary systems. They accept the claim that the US Congress creates red tape in order to constrain and control the operation of a bureaucracy that it cannot control directly. This motivation is absent in a parliamentary system with unitary government. Moe and Caldwell judge the parliamentary system of administrative law superior because it is less constrained by rules that introduce delay and complexity.³⁷ I am critical of Moe and Caldwell’s judgment that parliamentary systems are superior. To me, the procedures that they label “red tape” represent the strength of the US system. Even if they were created because of the nature of the separation of powers system in the US, it does not follow they, therefore, lack democratic legitimacy. Whatever the political motivations of the drafters of the US Administrative Procedures Act, it remains a fundamental aspect of the American democratic structure, and its basic principles could be productively

adopted by other democratic systems. Procedural constraints on the bureaucracy that require consultation and openness ought not to be evaluated as simply the outcome of political maneuvering. True, they introduce delay into the process, but they provide an important alternative route to democratic legitimacy that permits the participation of groups whose interests may be poorly represented by political parties in the legislature.

My own work has concentrated on Germany and the emerging democracies in Central Europe,³⁸ but it should be relevant to other parliamentary systems as well. I argue that democratic accountability requires an administrative process that permits widespread public participation in rulemaking. Agencies that are accountable to the chief executive and the legislature ought to have ultimate decision-making authority subject to an obligation to listen to citizens and to explain their decisions. Judicial review of the rulemaking process and of the rule's conformity with statute acts as an outside check on agency actions. In European countries that already have specialized courts to review administrative acts, it would be possible to extend their mandate to the review of normative acts. If the training of such judges were to include an introduction to social science methods, they could accomplish the type of review that I recommend for US judges. In fact, given the career nature of the judiciary in most of Europe, this could be accomplished more easily than in the United States if only the legal establishment accepted the value of looking outside narrow, legalistic boxes.

Conclusions

The public choice literature can help us to understand why delegation accompanied by judicial review is chosen by political actors and how the self-interest of political, bureaucratic and judicial actors interacts with institutional structures to determine the

outcomes. It can also illuminate the role of economic analysis in helping politicians and policy makers design and implement more effective policies. However, there are a number of limitations that suggest directions for future research. Positive political economy has exhausted the value of static, one-dimensional models of government. The more discursive legal literature recognizes the complexity of the real world but more could be done to incorporate some of these more complex factors into formal models without losing tractability. In particular, purely legal considerations are ignored by simple political models where judges' preferences are on the same dimension as the legislature and the executive. Analysts in this tradition need to incorporate judges' views of the law and of their proper role vis-à-vis the other branches. Furthermore, those advocating cost-benefit analysis and other analytic techniques as ways of making public policy choices need to analyze the potential tensions between democracy and net benefit maximization without giving up the value of careful analysis.

Finally, the public choice literature is often normatively impoverished. It models agency accountability merely as compatibility between what the Congress wants and what the regulatory agency does. However, a full evaluation of the accountability of agencies needs to bring in the preferences of the public. If the representative character of the lawmaking and oversight processes in Congress is in doubt, then government accountability to citizens may be enhanced by delegation. The rulemaking provisions of the US Administrative Procedures Act, which require notice, open hearings, and reason giving, can be justified not only as a way for Congress to find out about and influence what is happening, but also as a route for those especially concerned with a particular issue to have their say. The final decision is made by the agency, subject to the political

oversight of the president and the legislature and to judicial review, but the process gives a role to those outside government with an interest in the matter. Far from being a subversion of democratic principles, these procedures are a check on agency action and indirectly on congressional actions as well.³⁹

Of course, if this justification has normative weight, it raises a further puzzle for rational choice theorists. Why would Congress and the President support procedural provisions that undermine their ability to make policy in a way that seems to them most politically expedient? The public choice literature suggests some partial answers that depend on the self-interest of political actors, but those results highlight the importance of examining existing procedures to be sure that they do indeed further the goals of open government with broad public participation. A system that can be explained on the grounds of self-interest may, nevertheless, serve broadly democratic goals of participation and transparency, but that result cannot be taken for granted by those concerned with the continued health of complex modern democracies and of the newly emerging democracies worldwide. That is why I also urge reforms that incorporate cost-benefit analysis as a background norm in judicial review of regulatory statutes designed to correct market failures. True the cost-benefit test would not necessarily be chosen by a fully democratic procedure, but it is a reasonably clear standard tied to individual preferences that can make special interest deals harder to accomplish without tying the hands of the state.

In short, I am arguing for a more explicit incorporation of the operation of legal rules and institutions into the public choice framework. Work on these topics in the member states of the European Union and at the level of the EU

itself could be especially fruitful. I hope that the some members of the European and American Public Choice Societies will take up these issues and develop fruitful ways of combining public choice, public policy, and public law.

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¹ See Mishan (1976) updated as Mishan and Quah (2006). For texts see Stokey and Zeckhauser (1978) and Weimer and Vining (2005).

² Little (1958, 2003)

³ Sunstein (1996, 2002), Adler and Posner (1999).

⁴ Rose-Ackerman 1980, Richardson 2000.

⁵ Tsebelis 1995.

⁶ Their interest in providing constituency benefits may also influence the choice between regulatory forms. Agency administration may be preferred over direct enforcement by the courts because there are likely to be few opportunities to aid constituents when enforcement depends upon private lawsuits (Fiorina 1982).

⁷ Wilson's insight is formalized by Fiorina 1982.

⁸ Matthew Stephenson (2006) has recently expanded on Fiorina's model by hypothesizing that court decisions are more predictable over time but more variable over issues compared with agency decisions. Agencies can have a coherent policy approach at any point in time in line with an administration's priorities, but its policy stance can change over time as presidents and administrators change. The choice of regulatory structure will then depend upon the median legislator's preferences over these two kinds of uncertainty and their interaction with his or her substantive preferences.

⁹ See also their book length treatment of the issue, which includes a number of empirical tests (Epstein and O'Halloran 1999). John D. Huber and Charles R. Shipan (2002) compare delegation in parliamentary democracies with delegation in the United States and conclude that legislatures generally control discretion using substantive provisions rather than process. They also find that delegation is less under divided government in the United States and under minority regimes in parliamentary systems.

¹⁰ Volden 2002.

¹¹ Jonathan Bendor and Adam Meirowitz (2004) provide a twist on the standard story by assuming that bureaucrats themselves can decide whether or not to invest in expertise. In their model, officials have more incentives to become experts the farther their policy preferences are from those of the legislature. Under some conditions, their model predicts more delegation to bureaucrats who have policy preferences that diverge from those of the politicians.

¹² Administrative Procedures Act (APA) 5 U. S. C. §§ 551-559, 701-706.

¹³ Steven Balla (1998) shows that the "deck stacking" hypothesis has little explanatory power in the context of Medicare reimbursement policies.

¹⁴ Going further, R.J. de Figueiredo, Jr., P. T. Spiller, and S. Urbiztondo (1999) examine the legislature's tradeoff between policy benefits and the imposition of ex post inducements (penalties and sanctions) for bureaucrats. They point to the value of oversight by multiple interest groups.

¹⁵ Stigler 1971, Posner 1974, Peltzman 1976.

¹⁶ Economic analysis has also influenced the debate over regulatory techniques. Economists have long urged governments to set prices for scarce public goods as a way to ration and allocate them efficiently. Led by economists at Resources for the Future, policy analysts working on environmental issues began to recommend either pollution charges levied on effluent or the sale of pollution rights (Kneese and Bower 1968; Dales 1968; Ackerman, Rose-Ackerman, Sawyer, and Henderson, 1974). They recognize that the government is unlikely either to have the information to be very confident of its estimates or to be able to monitor all aspects of industry behavior. Pollution charges and the sale of rights respond to these information and control deficits. Pollution charges require the government to determine the marginal benefits of control and allow polluters to set their discharges at the point where their marginal costs equal the fee. The government need only be able to measure marginal benefits. In contrast, the sale of rights requires the government to set the permitted overall level of discharge and allows the price to be set by competition between firms (and environmental groups) for the limited supply. The relative merits of these options have been debated in the literature and depend upon the nature of benefits and the degree of uncertainty. Examples of both are beginning to be used in the control of pollution and other environmental problems in the United States and elsewhere in the world. (Gayer and Horowitz, 2006, and Stavins, 2003, provide comprehensive literature reviews of market-based approaches to environmental regulation. See also Ackerman and Stewart, 1988 and Tietenberg 2006).

¹⁷ Kagan 2001, Pildes and Sunstein 1995.

¹⁸ Haveman and Margolis (1970) is a collection of articles assessing the state of policy analysis as a technique and as used within the federal government under the so-called, planning-programing-budgeting system. An early collection of cost-benefit studies is Dorfman (1965).

¹⁹ Morrison (1998) reviews the conceptual issues, notes the variation in rates used and advocates judicial review to resolve disputes related to disparities in the discount rate across agencies and studies. The use of cost-benefit analysis and regulatory oversight in the US is monitored by the AEI-Brookings Joint Center. The Center co-directors, Robert Hahn and Robert Litan (2005), review US and European experiences and urge a strengthened commitment to cost-benefit analysis backed up with institutional reforms.

²⁰ Rose-Ackerman 1988, 1992; see also Sunstein 2002: 191-228.

²¹ For an overview the Republican Congress' efforts to mandate CBA see Sunstein (1996).

²² Ferejohn and Shipan 1990, Gely and Spiller, 1990.

²³ In commenting on Eskridge and Ferejohn's article, however, Andrew Ruttan and Peter Strauss (1992) critique their approach to the *Chevron* case and to judicial review in general and provide some realistic counter examples.

²⁴ See also Cross and Tiller (1998) who try to explain why lower court judges would follow *Chevron* if their own views conflict the agency. They argue that judges place on positive value on following precedent and this may deter them from following their policy preferences especially if a judge on the panel might point out their failure to follow precedent.

²⁵ Ferejohn and Spiller 1990.

²⁶ Mashaw and Harfst 1990; see also, Hamilton and Schroeder 1994.

²⁷ Joseph L. Smith and Tiller (2002) provide some empirical support for this claim.

²⁸ Baum 1994, Rose-Ackerman 1990.

²⁹ Sunstein 2003.

³⁰ Rose-Ackerman 1992, 33-42; see also Hahn and Litan 2005, 501; Sunstein 2002: 191-228.

³¹ Rose-Ackerman 1995, 2005; Shapiro 1992.

³² For a defense of referenda the recent work of Frey, for example, 2001, 118-135.

³³ Bignami 2004, 2006, Craig 2006.

³⁴ Rose-Ackerman 2005, 37-54.

³⁵ Rose-Ackerman 2005: 126-134.

³⁶ Martin Shapiro (1992) suggests that this is likely to occur as Commission rulemaking processes become more transparent and accountable.

³⁷ A small body of comparative work considers the operation of the administrative process in emerging democracies and in non-democratic states. One example is Huber and McCarty's (2004) models of delegation in political systems with low levels of bureaucratic expertise and competence. In such cases the legislature gains little from delegation, but it is also caught in a trap where it has little incentive to reform the bureaucracy or other institutions such as the courts.

³⁸ Rose-Ackerman 1994, 1995, 2005.

³⁹ Rose-Ackerman 1994, 1995, 2005; see also Mashaw 1985, Seidenfeld 1992.