1

Laws, Bureaucratic Autonomy, and the Comparative Study of Delegation

Representative democracy is often defended on the grounds that regular elections are the best way to align the incentives of policymakers with the desires of citizens. The normative argument is well rehearsed. Politicians make policy commitments, and electoral winners are given the chance to make good on these commitments through the laws they adopt. The laws, in turn, affect outcomes, and voters can react to these outcomes in the choices they make at election time. If policymakers fail to deliver on their promises, voters can use the ballot box to depose them. This power of voters over the policymakers, the story goes, keeps policymakers doing what the citizens want, which is a good thing.

Legislative statutes that politicians adopt provide the most important and definitive mechanism for determining policy on most issues. These laws define – or at least could in principle – the types of actions or behavior that may, must, or must not occur by particular groups or individuals in government and society. The language of these statutes therefore plays a fundamental role in the policymaking process.

The role of statutes in democratic processes, however, is somewhat amorphous. Ordinary citizens and attentive groups have only an indirect interest in the policies that statutes describe. Citizens, for example, rarely pay attention to policy details, and few citizens have ever read even a small part of an actual law. Instead, citizens care about the outcomes of policies. They do not care, for instance, about the precise language of a statute that establishes a national park for them to visit. Instead, they care that there is actually an attractive and accessible park available. Or they do not care about the precise language of legislation aimed at reducing sulfur dioxide emissions. Instead they may care that the lake nestled in the mountains has not been killed by acid rain or that the electricity they use is not

exorbitantly expensive. Irrespective, then, of the nature of statutory details, citizens reward politicians for outcomes they like and punish them for outcomes they dislike. Attentive interest groups are the same. Unlike citizens, they often pay very careful attention to the actual language of statutes. But like citizens, they care about the details of legislation only insofar as these details are expected to affect policy outcomes.

Since politicians should expect to be judged according to the outcomes their policies produce, they care a great deal about how the language of statutes will influence these outcomes. But in writing this language, politicians face a well-known tension. On the one hand, politicians can benefit from using statutes to delegate policymaking authority to bureaucrats and other actors who have knowledge and expertise that politicians lack, and who have the ability to address problems that politicians, all else equal, may prefer not to delve into. On the other hand, the very expertise that bureaucrats and other actors enjoy, along with their structural role in policy processes, provides them with opportunities to work against the interests of politicians and their supporters. How this tension is resolved ultimately determines the extent to which the electoral connection between voters and policymakers is severed by the practical need for politicians to delegate.

This book is about how elected officials use statutes to establish policy details in efforts to achieve desired outcomes. We focus on two different pathways that politicians can take in designing statutes. One is to write long statutes with extremely detailed language in an effort to micromanage the policymaking process. The other is to write vague statutes that leave many details unspecified, thereby delegating policymaking authority to other actors, usually bureaucrats. Our main objective is to develop and test a theory of delegation that explains the choices between these two pathways.

While we are hardly the first to explore this question, our specific focus is quite different from that of previous studies. As we will discuss in the next chapter, the study of delegation has typically been pursued within the confines of single countries. Consequently, the broad institutional context in which politicians find themselves cannot play a part in theorizing or empirical testing because this context is fixed. In contrast, we study delegation comparatively. By examining the choice between vague and specific statutes across a wide range of political systems, we can come to understand how the institutional context affects delegation strategies.

Vague and Specific Statutes

The following examples illustrate the types of differences we wish to understand. First, consider two statutes from the Irish and German parliamentary systems that focus on the issue of sexual harassment. Whenever politicians create new laws, they must define the individuals and the behavior that are affected. In the case of equality of men and women in the workplace, sexual harassment is one dimension where such definitions are necessary, and legislation takes quite different tacks defining who can be considered a harasser and what constitutes an act of harassment. Figure 1.1 shows how Ireland's Employment Equality Act of 1998 deals with this issue. Article 23 is very detailed, comprising four subsections and approximately 400 words. It sets out an exact definition of who might be accused of sexual harassment and under what conditions. It also includes extensive examples of behavior that will be construed as harassment, including not only requests for sexual favors but also "spoken words, gestures or the production, display or circulation of written words, pictures or other material" that "is unwelcome" and that "could reasonably be regarded as sexually, or otherwise on the gender ground, offensive, humiliating or intimidating." Thus, the statute itself gives reasonably clear instructions to any state agent that is trying to determine whether to classify an act as sexual harassment.

The relatively narrow discretion and specific construction of the Irish statute become clear when we compare it to the German statute, which is shown in Figure 1.2. Compared with Ireland's definition of sexual harassment the German law is unmistakably more ambiguous. The definition in Germany is much shorter, less than one-third the length of the definition in Ireland (it has 128 words as opposed to the 400 in Ireland). It is less precise about defining who can be found guilty of sexual harassment, simply stating that "Employers and managers shall be required to protect employees against sexual harassment at the workplace" and thus leaving ambiguous, for example, the responsibilities of employers for the behavior of clients, customers, or other business contacts.

The German law is also vaguer about which acts constitute harassment. In Ireland, for example, "any act of physical intimacy" is harassment if that act is "unwanted" by the employee. From Section 2, we know that this definition holds regardless of whether the act occurs in the workplace itself and regardless of whether it occurs in the course of the employee's employment. In Germany, by contrast, the law states that harassment occurs if

23. Sexual harassment in the workplace etc.

(1) If, at a place where A is employed (in this section referred to as "the workplace"), or otherwise in the course of A's employment, B sexually harasses A and either:

(a) A and B are both employed at that place or by the same employer,

(b) B is A's employer, or

(c) B is a client, customer or other business contact of A's employer and the circumstances of the harassment are such that A's employer ought reasonably to have taken steps to prevent it, then, for the purposes of this Act, the sexual harassment constitutes discrimination by A's employer, on the gender ground, in relation to A's conditions of employment.

(2) Without prejudice to the generality of subsection (1) in its application in relation to the workplace and the course of A's employment, if, in a case where one of the conditions in paragraphs (a) to (c) of that subsection is fulfilled:

(a) B sexually harasses A, whether or not in the workplace or in the course of A's employment, and

(b) A is treated differently in the workplace or otherwise in the course of A's employment by reason of A's rejection or acceptance of the sexual harassment or it could reasonably be anticipated that A would be so treated, then, for the purposes of this Act, the sexual harassment constitutes discrimination by A's employer, on the gender ground, in relation to A's conditions of employment.

(3) For the purposes of this Act:

(a) any act of physical intimacy by B towards A,

(b) any request by B for sexual favours from A, or

(c) any other act or conduct of B (including, without prejudice to the generality, spoken words, gestures or the production, display or circulation of written words, pictures or other material), shall constitute sexual harassment of A by B if the act, request or conduct is unwelcome to A and could reasonably be regarded as sexually, or otherwise on the gender ground, offensive, humiliating or intimidating to A.

(4) According to the nature of the business of A's employer, the reference in subsection (1)(c) to a client, customer or other business contact includes a reference to any other person with whom A's employer might reasonably expect A to come into contact in the workplace or otherwise in the course of A's employment.

Figure 1.1 Ireland's Employment Equality Act of 1998

Section 2. Protection against sexual harassment. (1) Employers and managers shall be required to protect employees against sexual harassment at the workplace. This protection shall also include preventive measures.

(2) "Sexual harassment at the workplace" is any deliberate, sexually specific behaviour which offends the dignity of employees at the workplace. This shall include:

(i) sexual activity and behaviour which is punishable under the penal law; and (ii) other sexual activity or invitations in this respect, sexually specific touching of the body and remarks with a sexual content, together with showing and putting up in public pornographic pictures which are clearly objected to by the person affected.

(3) Sexual harassment at the workplace is a violation of obligations under the contract of employment or a breach of work discipline.

Note: Bundesgesetzblatt, 30 June 1994, No. 39, pp. 1406–1415.

Figure 1.2 Germany's Second Equality Act of 1994

there is "sexually specific behavior which offends the dignity of employees at the workplace." Rather than adopting the clear criterion of an "unwanted act," the German law does not define what it means for an act to "offend the dignity" of the employee. And its list of examples of behavior is less well developed than Ireland's. In Germany, if you circulate but do not publicly display offending pictures, must a state agent consider this harassment? Can written words be harassment? What about gestures? In Ireland such acts clearly have to be interpreted as harassment, whereas in Germany there is wiggle room. Finally, the German law leaves unanswered questions about where and when such acts have to be committed in order for the acts to be harassment. If one employee makes unwanted physical contact with another employee at a pub after work, is this harassment? By Subsection 2(b) it evidently seems so in Ireland. By contrast, there is much more room for interpretation by other actors in the German case.

We see this same sort of variation across the presidential systems used in the U.S. states. Each of the U.S. states implements the federal Medicaid program, which provides health care to a variety of disadvantaged groups. In implementing Medicaid programs, states have considerable autonomy in devising policy details, and in the early 1990s a number

of states began to move Medicaid patients into managed care arrangements.[1] These Medicaid managed care (MMC) programs were adopted in large part to combat skyrocketing costs, and a sense of crisis, in the Medicaid program.

In reading the legislation that created these MMC programs, one is struck by the variation in the extent to which legislation spells out the actual details of policy. The states of Idaho and Texas provide a remarkable contrast. Idaho adopted a statute in 1993 that established a managed care system for Medicaid patients. The statute is about as vague as they come with respect to the level of policy details, saying little more than "establish a system of managed care." The section dealing with managed care reads, in its entirety, as follows:

> SECTION 2. The Department of Health and Welfare is hereby directed to develop and implement, as soon as possible, a new health care delivery system for those clients on Medicaid, utilizing a managed care concept. (Idaho HB 421, 1993)[2]

While there were other sections in this statute, none dealt with the issue of managed care. Thus, the legislation initiates steps toward creating a managed care system but does nothing to determine the contours of MMC policy. On the contrary, the law simply instructs the Department of Health and Welfare to "develop and implement" such a system, leaving all policy details to the agency itself.

A 1997 Texas statute also gives an agency the authority to implement a managed care system. The Texas law, SB 1574, begins in much the same way as Idaho's, instructing the agency to

> design the system in a manner that will enable this state and the local governmental entities . . . to control the costs associated with the state Medicaid program and that, to the extent possible, results in cost savings to this state and those local governmental entities through health care service delivery based on managed care. (Article 2, Section 2.01 (a) (2))

[1] We describe the Medicaid program and the policy issues it involves in more detail in Chapters 3 and 6. The main point at this stage is to note that the states are dealing with the same sets of policy issues, and they have autonomy with respect to the programs that they design.

[2] This was one of two bills that Idaho passed in the 1980s and 1990s about the transition to managed care for Medicaid clients. The other bill, passed in 1994, was equally broad in its delegation of power to the agency.

Although this very general instruction parallels the language in Idaho, the Texas statute then goes on to provide a number of particulars about how the managed care system for Medicaid clients should work. In several pages of text containing nearly 2,000 words, the Texas state legislature specifies numerous aspects of the managed care system.[3] Rather than simply leaving all of these sorts of decisions to the executive branch, or to the courts, the legislature mandates that the agency do the following:

- Design the system to emphasize prevention and promote continuity of care.
- Expand Medicaid eligibility, especially for children.
- Collect data, conduct comparative analyses of these data in order to assess the relative value of alternative health care delivery systems, and report this analysis to the Speaker of the House, as well as to the governor and lieutenant governor.
- Ensure that both private and public health care providers and managed care organizations are allowed an opportunity to participate in the program.
- Give extra consideration to providers who agree to ensure continuity of care for Medicaid clients for 12 months beyond the period of eligibility.
- Use, when possible, competing managed care systems.
- Establish pilot programs to deliver health care services to children with special health care needs.

The legislation also provides other instructions, telling the agency, for example, how it should determine which sorts of providers can participate in MMC. Without listing every detail of the Texas statute, it is clear that this legislation provides more specific instructions to the agency than does the Idaho statute. The Texas law does not spell out every detail about how the managed care system should work; but it does provide a large number of specifics, and in so doing, it constrains the decision-making authority of the health care agency.

These sorts of differences do not exist only when a program is first being set up. In 1996, for example, both Alaska and Florida addressed the question of how to deal with "mandatory enrollment" – in other words, whether Medicaid participants *must* enroll in a managed care program.

[3] Technically, this bill (SB 1574) was a revision of an earlier law. The provisions discussed later come from the portions of the law that were newly added by this bill.

The Alaska statute, HB 396, spells out briefly how mandatory enrollment should work:

> The department, under this Act, may require that a recipient of medical assistance under AS 47.07 must participate in a managed care system in order to remain eligible for medical assistance under AS 47.07. This participation requirement may be based on geographical, financial, social, medical, and other factors that the department determines are relevant to the development and efficient management of the managed care system.

In other words, the legislation essentially tells the agency that it has the right to require Medicaid (i.e., medical assistance) clients to enroll in a managed care system.

The Florida legislature takes a different approach in its statute, SB 886. The legislature tells the agency that all Medicaid patients should be required to enroll in managed care programs, but then spells out who should be exempt from this rule: people in institutions; clients enrolled in the Medicaid Medically Needy Program; and people who are eligible for both Medicaid and Medicare. Unlike the Alaska legislature, which gives the agency the discretion to determine whether enrollment should be mandatory, and if so, for whom, the Florida legislature not only makes enrollment mandatory, it also spells out exceptions to this requirement.

The Florida law thus provides greater constraints on the agency's discretion than does the Alaska law. In fact, the Florida law goes into even further detail on this topic. After determining who should be exempt from the mandatory enrollment rule, it then specifies the conditions under which people who might be exempt still can be enrolled in managed care programs. For example, patients who meet the exemption conditions but voluntarily choose to enroll in managed care programs will be allowed to do so. Furthermore, the bill states that no clients shall be required to enroll in a managed care program unless the program meets certain criteria for care, also spelled out in the legislation. Finally, the bill stipulates that the clients should have a choice of private managed care programs or MediPass, the state-run program in Florida. In the end, the statute spends approximately 1,500 words spelling out who must enroll in managed care programs, who is exempt, what sorts of information clients should be provided about their options regarding managed care, and what their rights are. Clearly, all of these instructions function to constrain the actions of bureaucrats and others who are involved in setting MMC policy.

Our Argument

These examples illustrate the basic empirical puzzle that we explore. When faced with the same policy issue, politicians in different political systems make different choices regarding how to design legislation. Some politicians – such as those who wrote the statutes in Idaho, Alaska, and Germany previously described – adopt astonishingly vague laws. Others – such as those in Texas and Ireland – attempt to micromanage the policy-making process by inserting substantial policy details into the legislation itself. What explains these different choices, and why might they matter?

Understanding why politicians sometimes allow substantial discretion and at other times tell bureaucrats precisely what to do is important for a number of reasons and has held a central place in political science research agendas for many years. Often the issue of discretion arises with respect to fundamental concerns about political control of bureaucrats. Since vague laws give bureaucrats in the executive branch substantial discretion in formulating policy, such discretion is at times held to symbolize the wresting of policymaking control by bureaucrats from politicians. Thus, the idea that politicians give substantial discretion to bureaucrats often raises the specter of a vast, dominant, out-of-control bureaucracy.

As we will discuss in Chapter 2, recent studies challenge this alleged link between bureaucratic discretion and bureaucratic dominance. These studies correctly emphasize that such discretion is often *deliberate*. It is purposefully granted by politicians to bureaucrats because doing so is the best strategy for achieving desired policy goals. Of course, it is also possible that granting discretion is not a deliberate strategy for achieving policy goals, but rather is an unavoidable consequence of the political and institutional contexts. Legislative majorities may wish to limit discretion, but for a variety of reasons may be unable to do so. Thus, if one's goal is to link the study of discretion to the issue of political control of bureaucrats, it is important to understand when discretion is deliberate and when it is not.

Political control of bureaucrats, however, is hardly the only, or perhaps even the most important, reason to worry about discretion. The level of discretion also has important ramifications for the question of *which* politician is most able to influence policymaking. In March 2001, for example, President George W. Bush reversed course on a campaign promise to regulate the emissions of carbon dioxide. Bush had promised during the presidential campaign to establish mandatory reductions for carbon

dioxide and three other gases that contribute to global warming, a promise that outstripped the calls by his challenger, Al Gore, for voluntary reductions. Yet for a variety of reasons, Bush decided, once in office, not to mandate such reductions. He was able to make this policy decision precisely because the Clean Air Act (CAA) did not preclude him from doing so. If the CAA *had* limited his discretion by mandating the reduction of carbon dioxide, perhaps by specifying target levels and a timetable, Bush could not have simply decided that the gas need not be regulated. This example, like others we describe in this book, indicates that discretion levels often influence not just the relative roles of bureaucrats and politicians, but also which political actors are most able to influence policy.

Strategic incentives involving discretion affect other salient aspects of politics as well. We will argue, for example, that our theory of how politicians design laws has important implications for transparency in policymaking. Our case study of Michigan (Chapter 5) provides an excellent example. In Michigan, a very vague, high-discretion statute moved the policymaking process behind the closed doors of the relevant agency, causing frustration among even politicians with their ability to know how decisions were being made. By contrast, a more specific, low-discretion statute one year later moved many decisions into the more open arena of the assembly and forced information to be revealed in the legislature during the policymaking process. We will also argue that studying discretion has implications for our understanding of compliance by bureaucrats with laws and for the ability of politicians to respond to the need for policy change.

Our simple purpose at this stage is not to develop these arguments, but rather to underscore the fact that understanding the level of discretion is important on a variety of levels. It contributes to our understanding of why legislators make the choices that they do in writing these statutes. It helps us to address traditional concerns about political control over bureaucrats. It provides insights into which politicians are able to influence policy. And it gives us a way to address other issues, such as transparency, compliance, and responsiveness.

Our central goal is therefore to develop an argument about the factors affecting the design of legislative statutes. The distinguishing feature of our argument is not only that it is applicable across a range of political systems, but, more importantly, it allows us to understand how differences in the institutional features across these systems influence delegation processes. Thus, we look to see how political and institutional differences