Citizens and Technocrats: An Essay on Trust, Public Participation, and Government Legitimacy

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This essay deals with the role of public participation in furthering democratic accountability and legitimacy. Clearly, the right to vote for representatives is a necessary condition for democracy, but there is much dispute over the importance of legislative deliberation and over the rights and responsibilities of citizens beyond casting a vote. Given the necessity of delegating policymaking and implementation to the executive in a modern regulatory-welfare state, how can democratic values be preserved when expertise is required and decisions must be made quickly in a rapidly changing environment?

At a minimum, trust in the impartial application of existing laws by the executive is a necessary condition for good administration (Rothstein 2011). However, it is not a sufficient condition, and it is valuable not only in democracies but in authoritarian systems as well. Impartiality assumes a background set of laws and policies that are administered using fair procedures, but it leaves to one side the processes which produce those laws and policies. Those processes are my concern. I ask how the generation of broad policies can be consistent both with the competent use of expertise and with accountability to citizens and other interested groups. To me, accountability implies transparency about what decisions are to be made, openness to outside input, reasoned decisions that are publicly accessible. Impartiality, in contrast, relates to the implementation of policies, not policymaking. It implies nothing about the particulars of substantive policy or about the legislative and rulemaking processes that are my focus here. In particular, I ask how public policymakers can credibly commit to using expertise to inform their decisions at the same time as they include citizens in policy choices. What are the practical options for citizen involvement and input from organized groups, such as, industry associations, labor unions, environmental and human rights groups? Would higher levels of both technical competence and public involvement limit corruption and other forms of self-dealing?

This chapter concentrates on the connections between expertise and public participation in the production of public policy. It is part of a larger project on the successes and failures of efforts to encourage participation and to incorporate state-of-the-art expertise. Section I unpacks the concept of public participation and the way it can affect policymaking and implementation choices for good or for ill. Section II concentrates on one specific case, the German Energiewende that aims to increase the generation of electric power from renewables at the same time as it phases out nuclear power. The German case demonstrates that public involvement is not per se desirable but must be organized to complement needed expertise and enhance democratic accountability. I argue that the effort to involve the public may have palliated some local opposition to the national policy but did not enhance democratic accountability. Section III concludes by placing this chapter in the context of my broader research agenda in comparative administrative law and public corruption.

1 I am grateful to Blake Edwards for very insightful comments on an earlier draft of this chapter.
I. What Is “Public Participation”?

The study of public input has two dimensions. First, citizens can provide input into institutions that make public choices—referenda, the legislature, government ministries and agencies, the courts, and private or public/private entities carrying out public policies. The second dimension is the nature of the decision. Here, I contrast broad policy choices—for example, environmental statutes, executive rules with the force of law, and structural injunctions issuing from the judiciary—with individualized decisions that, for example, license a particular plant, approve a public infrastructure project, or impose costs or provide benefits to an individual or business firm.

Table 1 summarizes the loci for public involvement, but one should note the interrelationships. Thus, some decisions are free standing choices, but others interact. For example, a civil society group may go to court to claim that it has been excluded from participation in one policymaking forum, such as an executive rulemaking. When the executive makes rules, it is constrained by the text of statutes that delegate policymaking to the executive. Furthermore, the distinction between general policy and individual decisions is not always clear cut. A series of adjudications can add up to a general policy, especially in a legal system based on the common law where judicial precedent operates (Sean Farhang 2010). Even in the absence of formal precedents, an agency’s established practices that persist over time produce a de facto policy framework.

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Most real-world cases include a technical component that cannot be evaluated without specialized knowledge. Yet, those with technical knowledge cannot be sure that their judgments accord with public values and preferences. Furthermore, even given a fairly clear mandate, experts may disagree on the best course of action based on their understanding of the facts and of the causal mechanisms. Hard scientists may disagree with social scientists, and lawyers may disagree with substantive experts. Issues that seemed settled at the legislative drafting stage may become controversial when analyzed ex post through a technocratic lens. Yet, often expertise can narrow the range of political choice and help focus the political debate. What factors determine whether technocracy will exacerbate or overcome policy controversies? Should experts seek to
educate the public to accept the policies they favor, or should they inform the public and then take into account the views of citizens and organized group before making a choice?

I will focus on the three central columns in Table 1, that is, tensions between public involvement and expertise in decisions taken by the legislature, by ministries and agencies and by the courts—in particular, their role in reviewing legislative and executive action. Two contrasting background models of democracy frame the debate. The first, in German the *legitimationskette* or “chain of legitimacy”, is a model of democratic accountability in a parliamentary system that flows from the voters at election time to a party coalition charged with forming a government and proposing legislation. In practice, the executive generally drafts statutes that are then debated and passed by the parliament. Statutes can then delegate certain policy choices to the executive. In the German case, statutes that delegate in that way must include the “content, purpose and scope of the authority” (German Grundgesetz, article 80(1). Article 80(2) requires consent of the Bundesrat, or upper house, for a subset of such rules). French law permits similar delegations but also gives the separately elected President some independent decree authority. In both cases public input is taken to occur at the ballot box, not in the legislature or the executive. Public accountability flows in a chain. Under this view it would be undemocratic and would risk special interest influence to introduce direct public involvement into executive rulemaking or even into statutory drafting. Both statutory drafting and rulemaking should be insulated from outside input to avoid biased and emotional responses. Lobbying is a pejorative term that signals illicit influence. The role of outside groups in providing information is downplayed. Of course, in reality no system actually avoids input from outsiders, and if such input is seen as illegitimate, it may simply go underground and behind closed doors (Heilbrunn 2005), but the background ideal remains of legal rules drafted by competent legal and technical experts.

The second model, reflected in United States practice, argues that democratic input should occur at all stages of the policymaking process. Elections provide a basic democratic check on legislative behavior; but that a check that is more attenuated for administrative actions, even with a separately elected president. The weakness of voter’s influence implies that both legislative and executive procedures must guard against undue special interest influence while enhancing the value of public input. The lack of a clear electoral connection implies that legal constraints on executive rulemaking ought to further democratic accountability through broad consultation, transparency and reason giving that help to make government rulemaking processes accountable to the public. Similar legal constraints do not apply to the legislative process, even if, as a practical matter, much consultation does occur, and there is a normative argument for more legally mandated public input. Rather, as I have argued in a previous book, the separation of powers in the U.S. presidential system and Congress’s constitutional power to make its own rules limit the legal constraints on the legislative process (Rose-Ackerman, Egidy and Fowkes 2015; with my co-authors we also consider the cases of South Africa, Germany, and the EU).

In contrast, neither model is explicit about the degree of public involvement for adjudications or individual choices involving large projects of various kinds. Even in legal systems, such as the German case, where public participation in executive rulemaking is not legally required and usually does not occur, individual projects or licensing decisions often include public involvement. This distinction between general policy and individual decisions is central to my assessment of what public participation can and cannot accomplish. Local projects are immediately salient to ordinary citizens living near the power plant applying for a license, the
railroad station about to be rebuilt, or a plan to route a high tension power line over a picturesque village (ibid.). Thus, in the absence of any institutionalized route for participation, the result can be street protests and other forms of direct expressions of unhappiness. Governments responding to such outpourings of public sentiment are likely to focus on individual infrastructure projects or licensing decisions, ignoring public involvement in broad-based policy choices. Thus, in Europe there is considerable public participation at the level of individual decisions compared with the relative lack of such processes in rulemaking (the production of secondary legislation). Although I can understand this difference as a matter of positive political theory, I argue that parliamentary democracies cannot justify this asymmetry by reference either to the strength of the democratic link for secondary legislation or to the technical quality of expert policy input.

However, even if one accepts my argument for the democratic legitimacy of public participation in rulemaking, how should such procedures be organized? Clearly, not everyone can be consulted, and even those willing to provide input may not be knowledgeable about the issues. The ultimate policy decision ought to remain one for officials with direct political accountability to the cabinet and ultimately to the voters in both presidential and parliamentary systems. Thus, in that sense I follow the conventional argument that opposes regulatory negotiation between designated “stakeholders” to produce binding decisions, except for a narrow range of choices (Rose-Ackerman 1994). Nevertheless, important questions remain about how to integrate the concerns of citizens, businesses, and other interest groups with the political and technical demands of public programs.

Let’s start with the critics. Democratic theorists justify delegation to ministries and agencies, and even to private self-regulating bodies, because of the lack of expertise of both legislators and citizens. Under this view, statutes should incorporate broad principles and standards that express public values; then, the law should delegate implementation to the executive. Those with expertise, both technical and administrative, should carry out public programs, and if the government lacks needed expertise, it should consult outside experts so that decisionmakers can access the most up-to-date science and technical expertise. To these critics involving either the general public or “stakeholders” in post-enactment policymaking would be undemocratic because participation is likely to be concentrated among those with intense personal or economic interests in the outcome. The policy tilts toward those with the most resources or the loudest voices. Even if the process is managed by a public agency that will make the ultimate decision, these critics worry about the undue influence of a few members of the public who do not represent majority opinion. The ideal for such critics is a statute that resolves all the vexed policy issues leaving it to ministries and agencies to carry out these policies as a technical exercise that relies on competence, not political legitimacy. These critics struggle with the reality of statutes that do not resolve many key policy issues, leaving it to ministries and agencies to issue rules to guide subsequent enforcement.

An archetypal example that illustrates the criticisms of public input is a report on a 2010 workshop at the University of Maastricht in the Netherlands. It is revealing in the frankness of remarks from public officials who expressed considerable skepticism about public participation once a law has been passed (Kaliarnta, Hage, and Roeser 2014). One organizer of public participation processes dealing with food safety stated:
If someone expects that … [stakeholder] participation should be part of my daily work, then I’ll say: ‘Wait a moment’. It might not be necessary each time, because people only want to hear from us that the food is safe (ibid. 240).

A civil servant agreed that “‘80 to 90 per cent of our daily work can be done without participation. In my work, most of the time we do our job without any participation process.’” (ibid. 240-1) Another participant justified this behavior by stating that if the stakeholders trust the risk-based approach used by the civil servants, then there is no need to involve them (ibid. 241). Furthermore, even if public officials wish to go beyond organized groups, they may have difficulty reaching the general public. Citizens may be uninterested, or regulatory bodies may have difficulty finding the right channels. Furthermore, the public may be poorly informed, leading some participants in the workshop to distinguish between “qualified” and “unqualified” stakeholders and to argue that time constraints often make it impossible to educate the public.

In the same workshop science was held up as a source of “correct information” (ibid. 243). Even when cultures differ, science provides a “baseline for some kind of common agreement” (ibid.). However, the participants recognized that science itself is uncertain. In spite of their general support for technocratic choices, they recognized that it could not answer all policy issues clearly. Unfortunately, in looking to science to help make policy, politicians demand more certainty than science can produce. One participant pointed to “uncertain risks” noting that “whether there is a real risk or whether there is enough safety cannot be answered by science” (ibid. 244). For those who distinguish between risk and uncertainty, a risk can be measured, in the sense that one can assign clear probabilities to various events (e.g., flipping a fair coin), but uncertainty arises if one can only guess at the probabilities. Most risks in the real world are at least, somewhat uncertain in that sense. Just because one cannot calculate certain probabilities does not imply that the risk is not “real”. The basic point is that, even if providing a baseline, science cannot do away with political or policy choices based on factors outside science.

Politicians cannot escape responsibility for public choices by relying only on expertise. In such cases one of the participants argued for “some kind of stakeholder participation to at least get to a common definition of what the problems are” (ibid. 245). How one should proceed from definition to policymaking is left unclear although participants mentioned, optimistically, how participation can build up trust in science and in regulators (ibid. 245-6). One fundamental tension is between scientific efforts to measure risk and estimates affected by emotional reactions, viewed a characteristic of the general public—even when people have been educated about risk measurements. The authors would distinguish between emotional reactions that are “founded” or “unfounded” with the former being brought into the policy discussion through public involvement (ibid. 250-1). However, making such a distinction does not seem easy to do and cannot itself be grounded only in the scientific evidence.

Thus, the critics of required public participation make arguments based on a particular view of democratic accountability and on the tension between competent application of expertise to the law and the views of the “general public”. Some see the problem as purely technical: it would be desirable, in principle, to include “the public” but it is not feasible because of the government’s time constraints and the lack of interest and knowledge in the electorate. Others make the more challenging claim that it both would be undemocratic to enhance participation and would limit the salutary effect of science on policy. The first line of response to this latter claim is the limitations of the legislative process in translating public views into credible legislative...
language. The link from a vote for a party or an individual candidate to support for particular statutory language is attenuated. The democratic chain that extends back to the voters is not very strong or well articulated. Furthermore, because statutes are often compromises between different points of view, they may be vague or inconsistent on purpose. Given these features of statutes, many of them cannot be implemented without the promulgation of general rules to give specific content to the statute. Technical expertise enters at that point but does not eliminate the need for policy judgments, informed by the views of those directly affected and by citizens with principled views of good policy. To balance these concerns, the cabinet or independent agencies ought to promulgate the rule after considering both technical arguments and the views of a broad spectrum of stakeholders and advocates for one or another view of the best policy. Given that any process takes time, energy and skill, how should government ministries put ideal into practice?

If the call for public input is open-ended, as it is under the notice and comment provisions of the US Administrative Procedures Act [§553], how does the government handle the possible influx of thousands of submissions? Are public hearings required and should they be held throughout the country? How much preparatory work should occur, involving preliminary input from organized stakeholders and technical experts? What kind of time limit should apply and should comments be publicly posted so others can respond? Is a second round of comments required if the agency revises its proposed rule in response to comments?

In the Dutch workshop one participant stated that in order to “count” as the general public, those participants would have to be unorganized—as soon as people become organized, they are not part of the general public (Kaliarnta, Hage, and Roese 2014: 242). As a matter of practical public policymaking, this is an absurd conclusion. It draws on Rousseau’s ideal where each individual expresses his or her informed but unmediated “will” to generate the “general will”, but that ideal is very far from reality. It one rules out the participation of organizations, collective action problems tempts everyone to free ride in the making of policy. If people band together out of moral commitments to promote certain policies or organize to support private benefits and public values, these groups are a way to generate public input, not a factor to be criticized. Of course, the biases feared by Rousseau are always a concern, but the task of responsible officials is to take them into account in making policy. In fact, even Rousseau at the end of the quotation in the above note seems to have recognized that the state cannot prevent organizations from forming; it just should encourage large numbers of them to organize. The

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2 Rousseau in the Social Contract, Book 2, Section 3 writes: "If the populace held its deliberations (on the basis of adequate information) without the citizens communicating with one another, what emerged from all the little particular wills would always be the general will, and the decision would always be good. But when plots and deals lead to the formation of partial associations at the expense of the big association, the will of each of these associations, the general will of its members—is still a particular [particulière] will so far as the state is concerned; so that it can then be said that as many votes as there are men is replaced by as many votes as there are associations. … If the general will is to emerge clearly it’s important that there should be no partial society within the state, and that each citizen should think only his own thoughts … And if there are partial societies, it’s best to have as many as possible and to prevent them from becoming unequal … These precautions are the only ones that can ensure that the general will is always enlightened and that the populace is never in error."
problem for the design of participatory processes is not too much organization but too little, putting the entire burden on public officials charged with issuing the rule.

Alternatively, suppose that the regulator keeps a tight control on the process and selects which stakeholders may participate and how their views are presented. Then the important issues are the criteria for selection and what is expected of those in the select group. Is the advice they give public or given behind closed doors? Such input risks being limited to those with connections to the executive agency or with sufficient organized political clout to demand inclusion and, perhaps, to exclude contrary voices.

In either case, one needs to determine if there is ex post review of the process and/or of the substantive rule by the courts, by the legislature, or by any other body? If review uncovers illegalities or other problems, is the result a remand to the agency or does the reviewing body fix the problem itself?

Central to any type of participation is the nature of the information provided. Do participants contribute factual material that can supplement expert input? Do they express concern, anger, or support by claiming to represent a segment of the public? Does real dialogue occur that involves give and take with other stakeholders or might a focus group or a well-executed survey be a good substitute? A considerable literature exists on alternative forms of public input, but some of it concentrates too much for my purposes on local decisions about particular projects that will have concrete effects on, at least, some of the population. Nevertheless, some of these experiments may suggest ways to generalize their results to higher levels of government. They suggest two types of participation in policymaking.

The first type responds to the infeasibility of involving the mass public. Rather, it selects a manageable group of citizens, provides them with information, allows them to deliberate, and then either treats their policy views as input into the agency’s decision or allows the group to make binding decisions. The citizens may be chosen through a stratified random sampling process to obtain a group that roughly reflects the major demographic categories in the polity, or anyone may be able to volunteer with a lottery or other method used to select participants. Alternatively, the public agency may either choose the participants or choose a list of groups, each of which can choose the individuals to participate. Members of the participatory body may consist only ordinary citizens, or it may also include representatives of business, labor, academia, etc. as well as public officials.

A second, analogous to US notice and comment rulemaking, does not involve deliberation but rather requires the government agency to inform the public about its plans, to hold hearings where anyone can submit a statement and consult the docket, and to provide public reasons for its final policy choice that take account of the comments received. This model does not require the agency to filter who may participate. Rather, the agency must weigh the probity of the comments before it issues a final rule. It need not respond to all comments but only to those with some probity for its decision.

Thus, the first model must avoid an overly exclusive, narrow range of consultation. The second must confront the diffuse nature of participation which may not assure a good balance of opinion. In that case it is up to the public officials to assess the public input and to balance those comments with other information about the benefits and costs of a rule. Structuring public
participation, under either model, as a constructive aspect of executive branch policymaking is a key aspect of democratic accountability, but it is often conflated with fights over the allocation of benefits and costs that have a zero-sum character—controversies not subject to reasoned give and take.

Hence, debates over the role of the public need to consider at what stage in the process participation occurs. When participation occurs, are policy options still open or have most routes been closed so that the decision is essentially a zero-sum game about dividing up benefits and costs or making marginal tweaks. A key point in evaluating past efforts is the extent to which the processes feed into a general decision about policy compared with cases that are divide-the-pie choices, where the size of the pie is fixed and the only issue is how to distribute benefits and costs. There may be nothing to discuss in the latter cases. The government simply needs to make a choice based on the competing interests. Alternatively, there may be no value in public dialogue if those with an interest in the outcome are sharply divided on ideological grounds. For example, a participatory process dealing with abortion laws in unlikely to be productive if it seeks consensus in the US political climate.

In the future I plan to study the alternatives and assess the evidence on which are more or less appropriate for different kinds of public decisions, from general rules that makes policy to individual decisions about infrastructure or licensing. To make the enterprise more concrete, I conclude this essay with a short introduction to the German shift toward renewable electric power and away from nuclear power. It is, for me, an example of the confusion in the public participation debate between policymaking, through some kind of public participation and dialogue, and the resolution of local NIMBY conflicts where there are clear winners and losers.

II. The German Energiewende: Nuclear Power Phase-out and the Shift to Renewables

The extended debate in Germany over nuclear power and renewable energy illustrates the interplay between public opinion, politics, and technical expertise. In 2011 the German legislature voted overwhelmingly to phase out nuclear power over a period of years and to speed up the development of renewable sources. This vote followed decades of controversy over nuclear power that began in the midst of the cold war, long before global warming became an issue. The interest in non-nuclear renewable energy as a substitute for electricity generated by coal, oil, gas, and nuclear pre-dated the Fukushima disaster in Japan, but that disaster focused the attention of the public and counteracted industry claims for nuclear power as an effective answer to problems of global warming. German energy policy has taken a strong turn toward renewables—called the

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3 This section draws on Groebel (2013); Durner (2014, 2015).
4 The new legislation, the Netzausbaubeschleunigungsgesetz Elektrizitätsnetz [NABEG] and amendments to the Energiewirtschaftsgesetz [EnWG] §§ 12a ff., and Renewable Energy Sources Act (Erneuerbare-Energie-Gesetz [EEG] were designed to speed up grid expansion and thus enable the phase-out of nuclear power. The Atomic Energy Act was amended to change the deadlines for plant closures. The focus on renewables and the phase out of nuclear power began earlier. Under a Social Democratic/Green coalition, the EEG (2000) guarantees renewable energy a connection to the electricity grid with priority over conventional energy and a high feed-in tariff for 20 years. Amendments to the Atomic Power Act were designed to phase out nuclear power by 2022. However, after 2009, when the Christian Democrats returned to power in a coalition, the nuclear phase-out dates were delayed [Amendments to the Atomic Power Act of 2010, § 7 Sec. 1a, and appendix 3]. The 2011 legislation built on this background by speeding up the nuclear phase-out so it will be completed by 2022 and by increasing the share of renewables in electricity supply. In addition, legislative provisions seek to increase the efficiency of energy use and conservation.
Energiewende to bring to mind the so-called Wende (rapid change) that accompanied the reunification of Germany after 1989.

Public opinion strongly supported the phase-out and, hence, political parties from the Greens through the Social Democrats to the Christian Democrats supported it in the Bundestag. The only significant opposition came from the far-left Linke party that opposed the bill for not being speedy enough. The amendment to the Atomic Energy Act was passed in the midst of what was already a commitment to develop renewable sources of energy and to downplay nuclear power. At the same time, the coalition extended the commitment to renewables and supported the expansion of electrical grid to transport this power. The law set a goal of generating at least 35% of electricity from renewables by 2020, with continuous increases to 80% by 2050. By 2013 the actual share of renewables in the total was 23.4% although it is important to note that lignite (soft coal) still accounted for almost 26% of the total.

However, implementing the shift to renewables has created practical problems of storage and the transport of large amounts of power from the north of Germany, where wind is prevalent in the North and Baltic Seas, to the west and south where the industrial needs are concentrated. The German law requires power grid operators to accept electric power from renewable sources with subsidies given to them to help cover the cost. This stimulated the production of wind power but put a strain on the grid. Statutory law then set out a multi-stage process to upgrade the grid. It began with a process to determine the termini of power lines based on plans submitted by the grid operators and consultation with other stakeholders. These plans were enacted into law by the Bundestag. The next step, still in progress, is determining the routes in detail, and here is where public opposition arose. Residents complained about power lines going over their towns and villages, and those concerned with the natural landscape and biodiversity objected to the lines’ passage over nature protection areas. At present Germany is moving toward burying at least some lines underground near inhabited areas, but that option will be very expensive. In the absence of new gridlines, wind power must either be disconnected from the grid during very windy days or diverted outside of Germany to Poland and Austria in ways that lead those countries’ electric power plant operators to complain. Power plants in these countries may need to shut down on windy days so the local grid can absorb excess power from Germany. Substantially more wind power is due on line in the coming years, exacerbating the problem. Furthermore, the chief minister of Bavaria, faced with opposition to electric power pylons, is questioning the state’s need for northern power. He claims that the state can produce renewables from biogas and purchase or produce non-renewable power. Of course, those supporting the federal policy, now including not only those concerned with climate change but also the major firms in the industry, argue that the basic choice to build new grid lines has already been made so

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5 The atomic power phase-out passed the Bundestag with a vote of 513 to 79. The changes in the laws dealing with renewables and grid expansion were only approved by the governing coalition. See Lang and Lang (2011).
6 Notice that the goal refers to electric power only, not to transportation, such as automobiles and trucks.
7 AG Energiebilanzen, 12/2013., http://www.unendlich-viel-energie.de/English.
that only the route remains in questions. The commitment to the new grids is embodied in a statute that sets the basic parameters of the grids, leaving the details to subsequent negotiations. However, as a matter of practical politics the objections from Bavaria and the complaints of property owners and nature protection groups are deeply intertwined and are influencing the policy debates.

Germany has made a political choice to favor renewables and to do away with nuclear power, even though its actions, taken by themselves, will have little impact on the global climate or even on the more immediate dangers of nuclear power in Europe, given that France remains heavily dependent on nuclear power with many plants close to the German border. However, what looked at first like an almost unanimous, if costly, compromise is coming unstuck as implementation proceeds. Very local and immediate concerns are stymieing efforts to implement the broad policy. If the government responds with costly fixes, the falling cost of producing renewable electric power will be canceled out by the increased cost of its transportation.

Given the statutory framework, how do technical expertise and public attitudes interact? Would better technocratic assessments in the form of cost/benefit analyses and risk assessments have helped diffuse opposition and led to better policy responses to the potential harms from climate change and nuclear meltdown? In this case the answer is no, but the reasons are complex.

Cost/benefit analysis is an exercise in applied utilitarianism that seeks to maximize net benefits in monetary terms of a policy in a way that discounts future benefits and costs back to the present. Absent cardinal, inter-personal measures of utility, the analyst relies on money as a metric. The problem, of course, is that money does not straightforwardly translate into utility. On the margin, a dollar is more valuable to a poor person than to a rich one, everything else equal. Thus a rich person is likely willing to pay more in dollars than a poor one, even if the actual change in utility for each is similar. Furthermore, no one really knows how to measure utility in units that can be compared across people. Dollars are a weak substitute. Nevertheless, cost/benefit analysis can be a worthwhile way to rank projects that improve the efficient operation of the economy in the medium run without important effects on the distribution of income and wealth.

The shift to renewables represents a commitment to three principles that are quite distinct both from the utilitarian values behind cost/benefit analysis as well as from each other. The first principle is the belief that governments ought to respond to the threat of climate change that could have disastrous consequences for the planet. But does German policy respond in a practical way to the problem of global warming? Here, sadly, the answer is no. Even if Germany were to produce one hundred per cent of its power from renewables, the impact on the climate would be very small. Hence, the justification for the Energiewende must rest on its demonstration effect, designed to stimulate other polities to follow suit—a justification which may have had some impact on the Paris climate talks in December 2015. The second principle is that nuclear power is simply too risky to be used for power generation, where the worry is accidents produced by earthquakes or other catastrophic failures. Here, the major concern is the large, irreversible losses that might fall on groups of people at a particular but unknown time. Those who support the nuclear phase-out do not balance those losses against the benefits of

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inexpensive nuclear power, a source of electricity which does not affect the climate. Such a tradeoff is viewed as an effort to devalue the harm suffered by the victims of an accident. The third principle is a wish for self-sufficiency in energy, especially the desire to avoid dependence on natural gas from Russia. Low-cost German coal is still currently in use, but that fuel contributes both to present air pollution and to greenhouse gases. The turn to renewables is seen by some as a route to greater self-sufficiency—flying in the face of EU efforts to integrate the electric power market in Europe. None of these arguments for the shift to renewables would survive a cost/benefit critique. They simply operate on different principles.

Second, the current controversy in Germany is not, at least overtly, about broad principles related to overall energy policy. Instead, it concerns the details of exactly where the new grid lines will be built and whether they will be overhead lines or buried underground. Bavaria is trying to reopen the debate over the general policy, but the federal government hopes to avoid doing so. The general grid routes were embodied in statutes in an effort to keep subsequent controversies focused on the routes’ specifics, not broad policy. The problem on the surface is a classic example of NIMBY (“not in my backyard”) politics, supplemented by the concerns of nature protection groups to keep natural landscapes free of power lines. The decisions that must be made are divide-the-pie decisions. If the line does not cross my village, then it may need to cross yours or else interfere with a nature protection area. The German cabinet has proposed the costly option of burying the lines in the earth. Alternatively, residents could be compensated although they might exaggerate their costs to increase their compensation. Advocates of building the grid argue that birds like to perch on power lines, while others claim that even burying the lines is problematic because it disturbs other animals’ habitats. Political controversies swirl. An article in a German newspaper claimed that a leading politician had promised that the grid line would be buried as it passed through a town in his home district, causing controversy. It would certainly be useful to have cost estimates for different options that include the costs of compensating for losses to residents, but the basic policy choice has already been made based on other principles.

This case illustrates a basic problem at the interface between public input and technocratic knowledge. Policy is made at one government level—here, through statutes proposed by the prime minister and her cabinet and passed by the legislature. They are passed in response to a disaster in another country but feed into a longstanding political debate over nuclear power that dates back to the Cold War. Debates over nuclear power interact with current political agitation toward renewable sources of energy. On the surface, a phase-out of nuclear power would increase German dependence on coal and natural gas, and that has, indeed, happened in the short run. The response is a larger commitment to renewables such as wind, solar, and biogas financed, in part, by public subsidy and accompanied, so far, by public support. Although both the phase-out of nuclear power and the shift to renewables were broadly popular with voters, there was no focused debate on the implications of the law. Intensive efforts to involve the public were only incorporated into statutes for downstream decisions on where to locate the power lines, wind farms, and solar collection fields. The statute dealing with high-tension power lines includes multiple decision nodes that require public input, but the emphasis is strictly on local issues dealing with the location, health risks, and aesthetics of the particular route choices. Even if the response to local objections is to vastly increase the cost of the shift to renewals, the underlying policy will not change. Participation that occurs at the local level is about avoiding

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10 Gabriel lässt ein Stromkabel unterirdisch legen, FRANKFURTER ALLEGENEZEITUNG, February 4, 2015, p. 17.
costs by shifting them to other localities or to the federal government. It is not about the tradeoffs behind the broad policy shift. German citizens may end up with an energy policy that edges up in cost over time through a series of individual decisions that involve local citizens in shifting costs to others. Efforts to avoid imposing disproportionate costs on small groups of citizens is a valid policy goal consistent with democratic values, but such actions should be included in the national policy debate, along with their costs, either in the legislative process or afterwards as the government makes policy. These rulemaking processes should take into account, not just NIMBY concerns, but also overall public support for the costs of the switch. Public participation ought not to be only about zero-sum cost allocations but also about the substance of policy. In fact, if the issue really is a zero-sum divide-the-pie, there are inevitable winners and losers. Citizens cannot negotiate to a consensus. Public input can clarify the extent of the gains and loses—always taking into account strategic incentives to overstate loses and under-state gains. However, a zero-sum case cannot be part of a democratic process that aims to clarify the issues and narrow areas of disagreement through dialogue and debate. Even if the ultimate decision depends on statutory language and the judgment of top government officials, public input and official statements of reasons can help improve the democratic legitimacy of executive policymaking. The German case is an example of placing public participation at just the wrong stage of the policymaking process—where the policy is set and all people are fighting about is the division of the gains and losses. Notice, however, that politicians in Bavaria are trying to reopen the general policy debate over the relative merit of renewables, nuclear power and fossil fuels in the light of the controversy over power lines. Obviously, the federal government wants to avoid that outcome, but however bothersome the Bavarian politicians may be, at least the broad issues they raise are ones that should be open to public debate. A general policy discussion over renewables and nuclear power phase-out could occur today in the light of downstream decisions about the location of power lines. The NIMBY issues would remain, but they could be considered as a part of the national policy choice.

III. Conclusions

Critique is all very well, but what, in fact, can be done to make public participation more effective? Proponents of true mass participation can do little more than organize street protests, submit on-line petitions, or administer surveys to gauge opinions. Involving a large share of the public in actually deliberating about policy is simply unrealistic. As many have noted, the basic problems are lack of knowledge and lack of motivation. Expertise may be both time consuming to obtain and very difficult for non-experts to understand, even if they do have access to the relevant documents and websites. Furthermore, ordinary people are busy with their own lives and may not believe that their marginal contribution will matter—they face a collective action problem that motivates them to free-ride on the actions of others. It also creates support for both for representative democracy and for delegation of technocratic decisions to the bureaucracy. I do not, however, believe that the situation is without hope. My own bias is against techniques that move too close to the corporatist model, where a group representing a fixed number of organized interests is permitted to meet around a table to discuss a policy topic, perhaps supported by staff. The risk, as I documented in some of the efforts in Hungary and Poland after the transition from socialism (Rose-Ackerman 2005), is that membership is frozen at a point in time and does not respond to changing interest group patterns. Open-ended opportunities to express views, as under the US notice and comment process, avoids that problem, but creates the
problem of too many comments and/or comments only from a biased sample. Thus, the bureaucracy must have a system in place to review written comments and to hold hearings, and it must also have the capacity to make technically competent decisions that use public input without being required to accept it. Officials must, however, give public reasons for their choices and submit to limited court review. I understand the critiques of this process, and I plan both to take them seriously and to consider reforms. However, the basic principle that inform my work are first, the acceptance of comments from anyone, not just the experts, and, second, the need for the government to justify its decisions with reasons that are neither simple expert determinations nor just compilations of survey and focus group results.


