

12 Designing Mechanisms of Public Consultation

A key element of our regulatory proposal is an institutionalized mechanism of public consultation. In chapter 10, we have argued that consulting with the public is necessary to mitigate the distorting impact of interest group politics, while in chapter 11, we have shown that an institution of public consultation is indispensable both to ensure agency independence and to prevent factionalism. In the following discussion, we lay out in some detail how it may be possible to implement institutions of public consultation that meet the requirements discussed in section 10.7: The agency must ensure that the consulted public is a representative sample of the general population, that the sample is balanced, that the consulted public is adequately informed, and, last but not least, that the process is deliberative.

With regard to the implementation of mechanisms of public consultation, it is crucial that the enabling legislation be sufficiently specific. First, the public should be consulted on any new regulatory initiative. Second, Congress should specify in some detail what criteria a consultative mechanism should meet. Third, Congress should mandate that the consultative process be conducted at the early stages of the rule-making process, in parallel to traditional consultations with organized interest groups, and in any case well before the announcement of a proposed new rule. Fourth, the enabling statute should require that the outcomes of any process of public consultation be published as soon as the consultation has been concluded, but in any case no later than the publication of a proposed new rule. All materials related to the consultation process must be made available to the general public.

In the remainder of this chapter, we explore two possible mechanisms of public consultation, deliberative panels and the consultative college. These two institutions of public consultation are reminiscent of James Fishkin's "deliberative polls."¹ Like Fishkin, we emphasize the role of informed public opinion in policy-making. Our approach differs from Fishkin's in that feasibility considerations play a more prominent role in our discussion. Another important difference is the role played by consultative processes in the administrative system. In our view, institutions of public consultation should strengthen representative democracy, not be regarded as a possible substitute. Accordingly, we articulate more precisely the role of institutions of public consultation in the regulatory process.

¹ James S. Fishkin, "Deliberative Polling and Public Consultation," in *Deliberative Democracy in Theory and Practice* (Turin: European Consortium for Political Research, 2002); James S. Fishkin, "The Televised Deliberative Poll: An Experiment in Democracy," *Annals of the American Academy of Political and Social Science* 546 (1996); James S. Fishkin and Chair Patterson-Bannister, "Virtual Democratic Possibilities: Prospects for Internet Democracy" (paper presented at the Internet, Democracy and Public Goods, Belo Horizonte, Brazil, November 6-10, 2000); Iain S. McLean, "Does Deliberation Induce Preference Structuration? Evidence from Deliberative Opinion Polls" (paper presented at the American Political Science Association Annual Meeting, Washington, D.C., August 30-September 4, 2000, 2000).

12.1 *Deliberative Panels*

Deliberative panels expand and refine the concepts of consensus conferences and citizens' panels discussed in chapter 10. They address three important shortcomings of the latter two institutions of public participation: The views expressed by participants in consensus conferences and citizens' panels carry very limited political weight, the size of these groups is too small to be regarded as indicative of broad public sentiments, and they tend to produce polarized opinions.

Increasing the political weight of deliberative panels is a straightforward process. Instead of convening just one panel, regulators should run numerous deliberative panels. As we show below, convening a significant number of deliberative panels is both logistically feasible and financially affordable. Surprisingly, proponents of participatory methods, to our knowledge, have never entertained this possibility, an indication that there is a considerable room for experimentation and innovation in this area.

Deliberative panels differ from consensus conferences and other participatory tools in that they are not expected to produce a consensus. The purpose of convening a deliberative panel is to identify and evaluate ethical concerns, and – depending on the issue under consideration – to rank policy options from the most to the least desirable. This is in keeping with our conviction that deliberation can provide clarification and an appreciation of complex ethical questions, but cannot be expected to always move the participants toward consensual positions.

Preventing group polarization from distorting the final outcome presents a challenge. A sample of the general public based on the usual socio-demographic variables is likely to produce an uneven pre-deliberation distribution of existing views. This means that it may be difficult to assemble a large number of small deliberative groups with an equal number of views in favor of and against a regulatory proposal. As we have repeatedly pointed out in this report, deliberation among members of an unbalanced group could reinforce *a priori* beliefs and induce group polarization. Obviously, this is not a desirable outcome, if indeed this shift is caused exclusively by a pre-deliberation bias. An institution of public consultation must be neutral with regard to the possible final outcomes.

Fortunately, a straightforward solution to this problem exists. If we assume that the participants' attitudes are not extremely skewed, it is relatively easy to assemble two representative samples of the general public, one consisting of individuals generally supportive of and the other of citizens opposed to a given policy option. If the public holds views pro and con in roughly equal proportions, or if the public has no strong opinions or else is ambivalent about a new biomedical development, assembling balanced pre-deliberation panels is a straightforward process. In these cases, it is particularly important that the consultation process does not itself turn into a source of significant distortions by exacerbating polarization tendencies.

Public consultation does not become superfluous if a large fraction of the general public holds specific views. As we have argued in chapter 8, survey results often are exposed to the criticism that they merely reflect superficial views held by uninformed citizens. A mechanism of

public consultation is immune to this criticism. In this case, ensuring balance not only is far less important, but it also could also be seen, with some justification, as an attempt by the regulators to manipulate public opinion.

An alternative method to control for skewed pre-deliberation positions is to explicitly include this information in the analysis. Assuming that a sufficiently large number of panels have been convened, a statistical analysis will reveal the impact of the pre-deliberation bias on the final outcome. This approach makes a fairly complicated sampling process unnecessary and is less costly, but it may require a larger sample.

12.1.1 Questions of Implementation

Experience suggests that each deliberative panel should consist of no more than 10 to 12 participants. Larger groups would make it difficult to sustain genuine group discussions; smaller groups would require convening a much larger number of panels and would make the logistics too complex.

Participation in deliberative panels should not require citizens to commit a weekend or even a full day, as has often been the case for consensus conferences. Depending on the complexity of the issue under consideration, a few hours to one afternoon should be sufficient. In the summer of 2004, the Genetics and Public Policy Center at Johns Hopkins University in Washington, D.C., conducted six town-hall meetings, each lasting one afternoon, on the ethical dilemmas of new reproductive technologies. Conversations with the center staff have shown that it is quite possible to tackle complex ethical and policy question in one afternoon, including an initial familiarization phase.

There are several ways to familiarize the participants with the scientific aspects of reproductive medicine and biomedical research. The panelists could be required to participate in a short training session. Typically, this would consist of watching an introductory video or attending a presentation. Alternatively, the participants could receive print materials ahead of time. A well-structured online resource could complement both print and video materials. However, while availability of information alone is unlikely to motivate prospective participants to thoroughly familiarize themselves with complex scientific and ethical questions, this would only be a potential problem in select cases, as both the introductory session and the deliberation phase itself would serve to clarify most technicalities. To help the panelists feel comfortable with complex medical and scientific questions, a panel of experts representative of all relevant positions (industry, academic scientists, regulatory scientists, advocacy groups, and so on) would be available to answer questions about controversial scientific claims.

Making expert opinions available to a large number of deliberative panels presents a logistical challenge. A nationwide public consultation requires that all regions of the country have an opportunity to be heard. This means that deliberative panels would have to be convened at different locations around the country. As a practical matter, it may not be possible to assemble a group of nationally recognized experts at each location, nor is it feasible for one panel of experts to participate in every group discussion. One way to reduce the logistical

complexity would be to convene deliberative panels at different locations at roughly the same time. Information technologies (such as e-mail, online chat, voice-over-IP, and teleconferencing) would enable deliberative panels at different locations to communicate with the experts. And while it would obviously be impossible to assemble as many expert groups as deliberative panels, it is quite reasonable to assume that the agency could at least assemble several such panels.

Another distinctive attribute of deliberative panels is an Internet-based information clearinghouse, which would serve as a repository for all the educational materials (brochures, technical summaries, scientific publications, instructional videos, and so forth) and be made available to all participants and to the general public. The clearinghouse would also keep track of all questions put to the experts by the lay panelists and their answers. This feature would allow lay participants to learn from each other, and would drastically reduce the volume of questions the experts could expect to receive. Finally, the clearinghouse would serve as a repository for all recorded conversations among participants in each deliberative panel. Unlike other sources of information, recordings of actual deliberations would be made available to a general audience only after the consultation process had been concluded, and only in anonymous form.

12.1.2 Considerations of Feasibility

Deliberative panels are not entirely new, of course. In the last 20 years, there have been various efforts, mostly involving local matters, to engage the public in policy-making. We have discussed some of these initiatives in chapter 10. The most suggestive precedent to our proposal, however, is not a proposal aimed to enhance public participation, but a project designed to study the impact of jury deliberation on monetary awards in personal injury cases. This project is remarkable, among other things, because it demonstrates that it is quite possible to convene a very large number of deliberative panels in a limited period of time. The study in question was based on 500 mock juries, each consisting of six citizens, with a total participation of more than 3,000 individuals – an impressive number by any measure, and certainly more than adequate to ensure representativeness in a process of public consultation.²

Running 3,000 people through 500 mock juries turned out to be a surprisingly straightforward task, partly because the organizers limited the time for deliberation to only 30 minutes. Each session lasted one-and-a-half hours. It took the study authors only five consecutive weekends (consisting of a Friday, Saturday, and Sunday) to complete the study. On each day, the group ran eight sessions, each including four simultaneous juries. Recruitment started approximately three weeks before the first weekend. Assuming recruitment costs of \$35 per person, financial incentives to participate in this effort of \$100 per participant, and including personnel costs, convening 500 mock juries would cost approximately \$450,000 dollars.

These figures demonstrate that the logistics of organizing and running even a large number of deliberative panels are not overly complex, that the time required for conducting a process of

² Schkade, Sunstein, and Kahneman, "Deliberating About Dollars: The Severity Shift."

public consultation is modest, and that the cost is reasonable. In the case of a national consultative process, the convening agency would have to run things somewhat differently. The deliberative phase would have to be extended considerably. Regulators would have to budget for expert participation, for moderators, and for the implementation and maintenance of the Web-based clearinghouse. On the other end, the agency could assemble groups up to twice as large. Furthermore, to ensure representativeness, a sample of approximately 1,000 participants would suffice. Nevertheless, the overall costs for a consultative process are likely to exceed the above figure. This sum is not negligible, to be sure, but well worth it if it contributed to crafting a national consensus on highly controversial matters pertaining to reproductive medicine and biomedical research.

As for the online clearinghouse, a few suggestive precedents exist. Our own Human Biotechnology Governance Forum was intended to achieve similar goals, but constraints on financial resources have prevented us from fully implementing it.³ In its present form, the Human Biotechnology Governance Forum includes almost 3,000 news stories on scientific and policy developments, as well as dozens of commentaries and editorials. It also incorporates analysis and resources sections, the former focused on scholarly analysis and the latter intended as a tool for self-study. The Center for Genetics and Society Web site is probably the single best source of information available in the area of reproductive medicine, but does not include an interactive component.⁴ The Geneforum, a non-profit initiative launched in Oregon in 1998, promotes education and public dialogue on subjects broadly related to biotechnology.⁵ None of these online resources fully implement the information clearinghouse concept as envisioned here, but taken together, they suggest that its implementation is within reach.

12.2 Consultative College

Deliberative panels are predicated on face-to-face deliberation. An emphasis on traditional forms of small-group deliberation both is costly and increases logistical complexity. Importantly, it may force the agency to compromise on other design goals, such as the time available for deliberation or the number of experts and the quality of expert opinions. For this reason, in this section, we discuss an alternative mechanism of public consultation that retains deliberation (though not face-to-face deliberation) but tries to reduce logistical complexity and cost through the systematic use of information technologies. We call this approach a *consultative college*.

The consultative college is similar to deliberative panels in that it also strives to ensure representativeness. Just like deliberative panels, it begins with a familiarization phase, continues with a deliberation stage, and closes with participants ranking alternative policy options. Deliberation takes place in small, balanced groups, as is the case for deliberative panels. Unlike

³ See <http://www.biotechgov.org>.

⁴ See <http://www.genetics-and-society.org/index.asp>.

⁵ See <http://www.geneforum.org/>.

deliberative panels, however, deliberation in a consultative college is mediated by information technology. In other words, the deliberation in a consultative college renounces to face-to-face communication.

There are several important benefits to relying on information technologies for the deliberation phase. Geography in a country as large as the United States is no longer a constraining factor. Participants can be consulted from the comfort of their living rooms. Experts can receive and answer questions from anywhere. Public officials can monitor the entire process from one location. Travel needs are reduced to a minimum. Informational and educational materials can quickly and easily be made available to everyone.

The use information technology makes it possible to overcome otherwise severe time and spatial constraints. A consultation process can be stretched over an extended period of time, several weeks and perhaps even months, with minimal disruption for participants' daily routines. For example, college members could meet online once a week or once every other week over a period of several weeks. This approach would make it considerably easier for the regulatory agency to recruit participants. It would also make it possible to envisage a stable membership, if necessary. Repeated participation in public consultation would further reduce overall operational costs. Participants would have to receive a monetary compensation for their participation, but the savings from a dramatically simplified recruitment process and from relying on a stable pool of participants would more than offset these costs. Conceivably, over time, monetary rewards could be reduced as participation in a consultation process could become a source of (some) prestige.

The consultation process follows a familiar plot: College members first familiarize themselves with the therapeutic and scientific aspects of the reproductive technology under consideration. This is accomplished in the same way as for deliberative panels, i.e., by making print and video materials available to college members and by implementing an information clearinghouse. A panel of experts representing various interests and positions, convened by the agency, stands by to take and answer questions. Questions and answers are saved in the clearinghouse and made available to all members of the consultative college. In the final step, the agency gathers, evaluates, and synthesizes the range of expressed concerns and attitudes toward various policy options. This information forms the basis for crafting new rules and regulations.

As for the actual deliberative stage, college members rely on voice-based technology to communicate with each other. Text-based communication is possible, but should be used as a backup or as a tool for the moderator to get in touch privately with individual participants. The popularity of Internet telephony demonstrates that it is becoming both technically feasible and economical to use the Internet for voice-based communication. Our approach is not too dissimilar from what survey organizations have been doing for years. As part of their business portfolio, these organizations have assembled panels representative of the general U.S. population. These panels are polled regularly by phone on any number of topics. In recent years, polling organizations have begun using the Internet to enable online discussions among panel members. In the summer of 2004, the Genetics and Public Policy Center relied on one of these survey organizations to conduct an Internet-based deliberative poll similar to what we are

proposing here. More than 130 individuals participated in this project. Participants were assigned to groups of approximately 12 to 15 persons. Online meetings took place on a weekly basis over a period of two months. Each session lasted on average one-and-a-half hours.⁶

The extensive use of information technologies gives the convening agency an unprecedented ability to closely monitor the deliberative process and to quickly respond to unanticipated problems. For example, the review of online deliberation may provide cues as to an inadequate or insufficient understanding of technical and/or scientific matters among the college members. In this case, the agency would be able to provide additional information to select participants without embarrassing them in front of their colleagues. The agency would also be able to selectively foster contributions from passive participants by establishing separate discussion forums (“deliberative enclaves”) that would encourage these individuals to develop their own views privately until they feel confident enough to share them with their original audience.

The enabling legislation would require the agency not only to publish the proposed new rule in the Federal Register, but also to make the consultation process itself and all related materials available to the general public. This could have an important side effect: By becoming a focal point for individuals seeking reliable information on the medical and ethical aspects of a regulatory proposal, the clearinghouse is likely trigger an informational cascade.⁷ For example, Catholics may find it helpful to examine the views expressed by fellow Catholics represented on the college. Liberal voters may take a similar approach. To the extent that the views expressed by members of a reference group are more nuanced and differentiated than those expressed by corresponding organized groups, there is a chance that over time, the deliberative college would contribute to reducing societal divisions. To use the terminology developed in chapter 10, the college would contribute to depolarizing the public.

Conversations with representatives of the Genetics and Public Policy Center have shown that the technical hurdles to running a process of online consultation remain significant. On the other hand, the quality and reliability of information technologies is rapidly improving. The rapid development of Internet telephony suggests that in the medium term, technology no longer will play a constraining role. It is also becoming apparent that government agencies are beginning to explore uses of information technology beyond traditional considerations of efficiency and responsiveness. For example, in July of 2001, the EPA conducted a “National Dialogue on Public Involvement in EPA Decisions,” which was intended to supplement notice-and-comment through an online public consultation process. The initiative brought together 1,166 individuals over a period of two weeks. The result was 1,261 messages posted by 320 people, with many more reading the postings and the daily summaries. According to one commentator, the initiative was a resounding success.⁸ The same author also pointed out some predictable shortcomings.

⁶ Joan Scott, Genetics and Public Policy Center, personal communication.

⁷ See chapter 10 for a discussion of informational cascades and related concepts.

⁸ Thomas C. Beierle, "Democracy on-Line: An Evaluation of the National Dialogue on Public Involvement in EPA Decisions," in *RFF Report* (Washington, D.C.: Resources for the Future, 2002). That this initiative was the first of its kind speaks volumes about the real role of information technologies on administrative processes and

Participation suffered from considerable self-selection bias, ethnic minorities were underrepresented (in large measure due to limited access to technology), and time demands on the agency staff were considerable. There is also considerable evidence that outside the United States, especially in Europe, the role of information technologies is no longer seen simply as a tool to improve government efficiency and cut costs.⁹ In Britain, some commentators have advocated experimenting with mechanisms of public engagement not too dissimilar from what we have proposed here.¹⁰ The British Parliament took an interest in this matter as it published the "Sixth Report on Innovations in Citizen Participation in Government."¹¹

The concept of the consultative college as espoused in this chapter does suffer from some potentially important problems and limitations. Advocates of traditional forms of public consultation may argue that online deliberation is an inadequate substitute for face-to-face communication.¹² The evidence does not support this claim. It is certainly no secret that the quality of deliberation in online, text-based forums is indeed very low. It is also quite common for these forums to polarize in ways that can only be described as spectacular. But the poor quality of online forum discussions has everything to do with the rules governing these online forums, and very little to do with the medium itself. Carefully designed experiments to elicit possible differences between face-to-face communication and voice-based deliberation have found that online deliberation is just as valid an option as face-to-face communication.¹³ Other, in-depth studies have produced similar results. In a series of facilitated online deliberations conducted in 2000 involving both randomly recruited participants and control groups, researchers found that participation in online discussions can produce greater awareness of the

on rule-making. Federal agencies do of course rely extensively on information technologies, but technology is mostly used to increase efficiency and cut costs. They do not have a significant impact on the practices of rule-making. Yet it is in this area, as one commentator points out, that information technologies could play a very useful role. See Beth Simone Noveck, "Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer," *Boston University Journal of Science & Technology Law* 9, no. 1-91 (2003); Beth Simone Noveck, "The Electronic Revolution in Rulemaking," *Emory Law Journal* 53 (2004).

⁹ Dimitris Kyriakou, *Special Issue: On E-Democracy* (The IPTS Report 75, June, 2003 [cited September 6, 2005]); available from <http://www.jrc.es/home/report/english/articles/vol75/welcome.htm>; Malcolm Peltu and Stephen Coleman, "A New Agenda for E-Democracy: Positions Papers for an Oxford Internet Institute Symposium. In Association with with University of Maryland, Cisco and BT" (paper presented at the OII Symposium, Oxford, May 7, 2004); Bart Van Oudenhove et al., "Report on Electronic Democracy Projects, Legal Issues of Internet Voting and Users (i.e. Voters and Authorities Representatives) Requirement Analysis," (Consortium led by MATRA Systèmes & Information, 2001).

¹⁰ Stephen Coleman and John Gøtze, "Bowling Together: Online Public Engagement in Policy Deliberation," (London: BT Hansard Society, 2001).

¹¹ The full report is available at <http://www.publications.parliament.uk/pa/cm200001/cmselect/cmpubadm/373/37303.htm>. The government response is available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmpubadm/334/33403.htm>.

¹² Benjamin R. Barber, "The Uncertainty of Digital Politics," *Harvard International Review* 23, no. 1 (2001).

¹³ S. Iyengar, R.C. Luskin, and James S. Fishkin, "Facilitating Informed Public Opinion: Evidence from Face-to-Face and on-Line Deliberation." (paper presented at the American Political Science Association Annual Meeting, Philadelphia, PA, 2003).

underlying motives informing opposing views. Predictably, the researchers also found that deliberation can produce polarization.¹⁴ Representatives of the Genetics and Public Policy Center, for their part, have pointed out that in their experience, participants in online deliberations do engage each other in a respectful and constructive manner. They also noticed that voice-based interactions foster a more frank dialogue than traditional face-to-face communication.

Some commentators are likely to criticize our proposal for not being “open and transparent.” Others may argue that ours is an elitist approach designed to exclude rather than to include the public. We freely acknowledge that a process of public consultation as envisaged in this report is not open to the general public and it is not entirely transparent; it is not supposed to be. The legitimacy and credibility of mechanisms of public consultation as proposed in this report depend crucially upon the regulators maintaining tight control over the process itself. “Opening” the consultation process to a larger audience would obviously undermine any claim to representativeness; it would disrupt the deliberative phase and expose the entire consultative process to manipulation by organized interest groups. The proper way for the general public and for interest groups to provide input is through notice-and-comment afforded to all citizens by the Administrative Procedure Act. As for the claim that the proposed mechanisms of public consultation exclude the public, this criticism is unfounded. No other process of public consultation, to our knowledge, would afford the general public greater influence over the regulatory process.

Two other, possibly important problems are access to information technology and literacy. Extensive reliance on information technologies could prove a barrier for some, especially among the poor and the uneducated. The “digital divide” is shrinking, however, as the cost of personal computers has dropped significantly and continues to fall. The agency could remedy this problem by lending or renting for a nominal fee a TV computer, just as some polling organizations do. Literacy is a more serious problem. Even the best informational and educational materials require basic readings and analytical skills. It may be unrealistic to expect most participants to absorb lengthy policy briefs, even if they are designed with a lay audience in mind. Educational videos may mitigate this problem, at least in part. Conceivably, the convening agency could recruit volunteers willing to help struggling individuals overcome these barriers.

We realize that our discussion of online consultative tools does not provide satisfactory answers to each and every implementation detail. Our aim here was not to offer an exhaustive description of innovative mechanisms of public consultation. Rather, we wanted to demonstrate that the time is ripe for experimenting with innovative forms of public consultation. We hope our readers will find our discussion compelling enough to explore our proposal in more depth.

¹⁴ V. Price and J. Cappella, "Online Deliberation and Its Influence: The Electronic Dialogue Project in Campaign 2000," *IT & Society* 1 (2002); V. Price and J. Cappella, "Online Discussion, Civic Engagement, and Social Trust," (Philadelphia: University of Pennsylvania, 2003).

12.3 Public Consultation and Rule-Making

A question we have only peripherally explored in this report is the relationship between consultative processes and agency discretion. In chapter 10, we have argued that a consultative process does not compromise the agency prerogative to pursue a specific regulatory agenda. At the same time, a proposed new rule flying in the face of broadly shared public sentiments would be considered by some to be strong evidence of capricious and arbitrary agency behavior. In what sense, then, does a structured process of public consultation contribute to preventing or mitigating agency capture? How does a consultative process protect the independence – i.e., the credibility – of this agency?

Consider the case of an agency succumbing to pressures from an interest group, a powerful Congressional representative, or a senior White House official. Let's assume that the agency has conducted a consultative process and that the consultation has produced a clear and unambiguous result. The agency is considering ignoring this outcome and is strongly tempted to follow the recommendations of one or the other of its closest constituencies. This is an illustration of political failure as defined in chapter 10: The agency is catering to parochial interests to the detriment of broader public sentiments.

What considerations may affect the agency's decision to ignore or to abide by the outcome produced by the consultative process? As mentioned earlier, the enabling legislation requires the agency to make the results of all consultations available to the general public well before the agency publishes its proposed new rule in the Federal Register. The agency is perfectly aware of the implications of the "hard look" doctrine for rule-making and, in particular, of the need to provide a very detailed rationale for the assumptions informing a proposed new rule. The agency is entitled to propose a policy inconsistent with the outcome of a public consultation, but it would have to provide a well-reasoned explanation for this choice. To the extent that the agency was indeed considering an alternative policy for no other reason than political expediency, justifying a different choice may be extremely difficult. For this reason, the agency is likely to resist the demands by special interest groups and their allies in Congress even if regulators sympathize with these demands, or might have found it useful to cater to a powerful political constituency as a means to pursue other bureaucratic goals, such as ensuring future agency funding.

Now let's assume that the agency believes it can get away with a decision to ignore the outcome of a consultative process. Following the publication of the consultation results, the public has an opportunity to provide feedback through notice-and-comment. While some organized interest groups will certainly voice their support, the general public is likely to signal its disagreement to the agency in significant numbers, and point to the inconsistency between the consultation process and the proposed new rule. The Administrative Procedure Act requires the agency to acknowledge each comment and to "consider" it in drafting the final rule. The agency may try to finesse the inconsistencies brought about by its decision to overlook public sentiments, but it also knows that its responses to the received comments become part of the

administrative record and form the basis for judicial review. Knowing this, the agency will likely resist the temptation to ignore the consultation results.¹⁵

Critics may argue that even if an agency proposes a rule inconsistent with the outcome of a consultation process, the public is unlikely voice its disagreement through notice-and-comment, either because it won't notice the agency's disregard for public sentiments, or simply because it won't care. For this strategy to succeed, several fairly implausible requirements must be met. Public consultation should be a low-key affair with little or no media visibility. This is very unlikely, given the public nature of most bioethical controversies. Even if the media and the general public are not paying attention, organized interests groups are. These groups will immediately spot any inconsistency between consultation results and proposed new rule. In their comments to the agency, they would demand that the agency provide a rationale for its choice. These are also the groups most likely to challenge a new rule in court should they come to the conclusion that the agency has no reason to disregard the outcome of a consultative process. For these reasons,¹⁶ it would not be rational for the agency to assume that "bureaucratic drift" will go unnoticed.

Our discussion so far was based on the assumption that a process of public consultation will produce a clear and unambiguous outcome. This may not always be the case, however. A divided public – i.e., a situation in which any given policy proposal is approved and disapproved by roughly 50 percent of the public – would afford the agency considerably more discretion. Should agency discretion be considered problematic? Does this amount to the breakdown of a central mechanism of accountability? Most likely not. To the extent that the public is genuinely divided and/or ambivalent about a new reproductive technology or a revolutionary line of research, the agency could choose between two strategies. It could determine that it should move ahead and propose a policy that more closely reflects the preferences of organized interest groups. This would not be a case of agency capture, but of exercise of legitimate regulatory authority constrained by the enabling statute and Congressional intent. Alternatively, the agency could decide that it would be inappropriate to deprive the public of the opportunity to debate the pros and cons of a new biomedical development, and simply propose a moratorium.

As a matter of practice, it is very unlikely that the agency, after consulting with the public, will be left without guidance. It is certainly true that most people entering a consultative process are unlikely to have strong, informed views about a new biomedical development. But the empirical record suggests that citizens, if given an opportunity, are perfectly capable of developing informed opinions. And while it is certainly possible that a given policy option will

¹⁵ It is worth noting that agency accountability is the result of both public consultation and notice-and-comment. Absent notice-and-comment, the agency would face fewer incentives to abide by the outcome of a consultative process. On the other hand, rule-making without public consultation would greatly diminish the effectiveness of notice-and-comment as a mechanism of accountability.

¹⁶ The preceding discussion is based on the assumption that a rational choice model is an adequate representation of agency behavior. It would certainly be possible to analyze agency behavior from a somewhat less cynical standpoint, but a more sophisticated modeling exercise is very unlikely to affect our conclusions.

divide the public, it is quite unlikely that the general public will be divided on each and every available choice. As our discussion in chapter 8 has shown, more often than not, a divided public reflects inadequate alternatives rather than underlying deep divisions.

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