



Critical Review of International Social and Political Philosophy

ISSN: (Print) (Online) Journal homepage: <https://www.tandfonline.com/loi/fcri20>

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To cite this article: Kate Vredenburg (2022): Bureaucratic discretion, legitimacy, and substantive justice, *Critical Review of International Social and Political Philosophy*, DOI: [10.1080/13698230.2022.2133829](https://doi.org/10.1080/13698230.2022.2133829)

To link to this article: <https://doi.org/10.1080/13698230.2022.2133829>



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Published online: 07 Dec 2022.



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Bureaucratic discretion, legitimacy, and substantive justice

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ABSTRACT

Chiara Cordelli's book *The Privatized State* makes an important contribution to debates over the morality of public administration and widespread privatization. Cordelli argues that widespread privatization is a problem of legitimacy, as private actors impose their will unilaterally on others. Bureaucratic decision-making, by contrast, can be legitimate, within the correct institutional context and in accordance with a bureaucratic ethos. In this review, I argue that bureaucratic policymaking faces similar changes from the value of legitimacy that Cordelli raises against widespread privatization. First, I argue that for a polity subject to bureaucratic policymaking to be self-ruling, bureaucracies must incorporate more democracy; but, so doing goes against the rationale of their institutional form. Second, I argue that bureaucrats and private actors acting on behalf of the state do not have starkly different levels of free purposiveness, and that it is morally desirable for bureaucrats to have more free purposiveness than Cordelli allows, and private actors less.

KEYWORDS Chiara Cordelli; legitimacy; privatization; public administration; policymaking; justice

In *The Privatized State*, Chiara Cordelli tackles moral questions raised by the widespread outsourcing of core state functions to private actors, in areas such as welfare administration, the military, and criminal justice. She offers a new and compelling diagnosis of privatization as a problem of *legitimacy*, or the imposition of the unilateral will of private actors on the subjects of their policymaking. The arguments of the book are grounded in the Kantian tradition in political philosophy, but also draw on theoretical work from political science and economics, as well as empirical social science on the administrative state, privatization, and philanthropy. *The Privatized State* is thereby an exemplar of rigorous, empirically-grounded political philosophy, and merits serious engagement from those working on broader normative questions about representation, legitimacy and public administration, and domination and the dispersal of political power.

According to the Kantian moral theory that Cordelli expounds and defends, each individual ought to respect others as free – independent

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from the private will of others – and as possessing equal normative authority. For the Kantian, only democratic rule is compatible with individual freedom (and required by it, to secure the conditions of such freedom), because democracy is rule by an ‘omnilateral will’ that we ourselves have equal opportunity to shape.

This Kantian perspective seems to rule out any non-democratic – and thus privatized – policymaking from the get-go: privatization enables policymaking by unelected actors; unelected actors making policy is an exercise of unilateral power; so, widespread privatization is ruled out on grounds of legitimacy. However, as Cordelli discusses, many of our rights and entitlements are decided by unelected actors: bureaucrats. But, if the Kantian view of the legitimate state rules out bureaucracies, it thereby rules out one of the few organizational forms that seems capable of delivering the substantive conditions of freedom in an impartial and standardized way.

One of major projects of Cordelli’s book is to find conditions that legitimate legislative discretion by bureaucrats, and institutional mechanisms that could plausibly realize those conditions. Her discussion of the administrative state is a rich and important contribution on a topic that has been largely overlooked in political philosophy. A second major project of the book is to argue against widespread privatization, by arguing that only public organizations can fulfill the necessary conditions for legitimate decision-making.

One virtue of an ambitious and clearly argued book is that it opens up many avenues for debate. In this review, I will raise some objections to these two major projects. I will first examine Cordelli’s proposal for when and why exercises of bureaucratic discretion are legitimate, and then turn to the purported disanalogy between bureaucrats and private actors.

One of Cordelli’s important and insightful arguments against widespread privatization of government functions is that such privatization embodies an abdication of a democratic polity’s inalienable right to self-rule, because it erodes the pre-conditions of exercises of that right (Cordelli pp. 134–150). In the individual case, self-rule requires certain agential capacities that allow agents to ‘maintain higher-order control over the direction of his or her practical life’ (Cordelli: p. 136). These are epistemic and affective capacities to, say, monitor how well one’s life is going, and to be motivated to act in accordance with one’s judgments about how one ought to act. In a democracy, citizens authorize representatives and bureaucrats to act on their behalf. But, given Cordelli’s Kantian commitments, such authorization must be compatible with self-rule. Thus, self-rule requires higher-order control.

But, how can citizens and their representatives ensure that bureaucrats act to further the democratic will and substantive justice, rather than impose their own unilateral will on citizens? Cordelli discusses three types of mechanisms that are necessary and jointly sufficient to legitimate administrative

power. *Top-down mechanisms* of oversight and *bottom-up mechanisms* of political participation by citizens ensure that legislative power is not unilaterally exercised,¹ and that citizens are active in their self-governance.² However, the will of citizens and their representatives under-determine policy, as neither citizen intentions nor the legislative will have as their content the complex policies that administrative agencies generate and enforce. Thus, *fiduciary mechanisms* are also required, to ensure that administrators act from public purposes, rather than their private will, and that they constitute the public will by making policy that provides individuals with the substantive means of freedom. If all three mechanisms are in place, then administrative decision-makers are validly authorized representatives who carry out the will of the people.

For these bottom-up mechanisms to be effective in directing bureaucrats, however, citizens must have certain agential capacities for higher-order control, as discussed above. For example, individuals must have the capacity to judge whether agents act in line with their mandates and be disposed to replace agents who act outside of the bounds of their mandate (Cordelli pp. 142–148). Cordelli marshals compelling empirical evidence that privatization tends to undermine citizens' capacity for civic vigilance. Here, though, we may wonder whether bureaucratic decision-making also undermines the minimal conditions required for self-rule. Here, there is compelling evidence that citizens lack civic vigilance regarding bureaucratic decision-makers, but exercise civic vigilance regarding elected officials.

The Administrative Procedure Act in the United States creates many of the bottom-up mechanisms of political participations by citizens in bureaucratic policymaking. One such mechanism is a 'notice and comment' proceeding, where the relevant agency is required to notify the public of a proposed change to a rule, and members of the public can submit comments on the rule that the agency must review and respond to. I will take citizen submission of comments as an indicator of civic vigilance, as citizens monitor agency activity and are motivated to provide input to rules. Notice and comment rulemaking is thereby a valuable site of evidence about whether citizens exercise the epistemic and practical capacities necessary for self-rule.

The evidence is not favorable: there is low citizen participation in most notice and comment proceedings. For example, in 1989, the US Environmental Protection Agency received an average of twenty-five comments per rule, for the nine rules that it considered significant (Coglianese, 2006, p. 950). Despite the introduction of email participation, there still tends to be a relatively low number of comments, with the exception of controversial rules (Coglianese, 2006; Mendelson, 2011). Thus, it seems as if citizens do not have the capacities and dispositions required to participate in the mechanisms for civic engagement created by the Administrative Procedure Act.

Of course, this potential evidence is generated within institutions with widespread and pervasive privatization. Perhaps privatization has undermined residents' civic vigilance across the board. However, this point sits uneasily with the significantly greater participation by citizens in elections, where citizens do exercise civic vigilance. For example, there is evidence that US citizens commonly engage in performance voting, or voting based on the expected performance of the candidate (Achen and Bartels 2016: pp. 93–98).

What could explain these differing rates of political engagement? In notice and comment proceedings, individuals play a merely advisory role; they do not have decision-making power. But, in voting, citizens have more opportunity for political influence. The collective – specifically, the group of citizens whose chosen candidate wins the election – has decision-making power over who is elected.³ Furthermore, individual citizens may have decisive influence over who gets elected, in that each citizen has a very small chance of casting the vote that decides the election, all else equal. This asymmetry suggests that some collective or individual decision-making power over political outcomes is necessary for individuals to develop the epistemic and affective dispositions required for higher-order control. Individuals have reason to develop capacities to care about their political institutions and representatives' behavior in part because they can influence them, as an individual or as a collective; they have similar reason to develop capacities to learn about their political environment.

Thus, for administrative agencies to be compatible with the minimal conditions necessary for self-rule, they ought to incorporate more democratic decision-making. But, so doing would undermine the rationale for having administrative agencies. One rationale for policymaking by administrative agencies rather than representatives is that bureaucrats are experts. Another rationale is that bureaucrats are insulated from political pressures that may sway representatives to unjustly favor their electoral base, as bureaucrats are tenured, not elected (Cordelli p. 104). But, a reliance on tenured experts erodes the epistemic and affective capacities of citizens because it takes decision-making power away from them. Thus, Cordelli's argument faces a structurally similar objection to one that she poses for privatization, namely, that the conditions that legitimate discretionary decision-making are also the conditions that undermine the rationale for more discretion (in this case, bureaucratic discretion).

Now, let's turn to the second major project of the book, in particular, the purported stark difference in free purposiveness between bureaucrats and private actors. After compellingly arguing that privatization undermines legitimacy, Cordelli considers whether discretionary policymaking by private actors could be made legitimate. Here, she argues against a tempting way to increase the legitimacy of policymaking by private actors, namely, by constraining their discretion in the same way as public actors. But, Cordelli

argues, this undermines the rationale for contracting a private actor for a task in the first place. It also reduces the ability of private actors to set and pursue their own goals outside of the demands of justice. So, there is and ought to be a significant difference in free purposiveness between bureaucrats and private agents.

To dig a bit deeper into the source of the difference, it will help to begin with the fiduciary relationship that bureaucrats ought to stand in towards citizens, or a relationship where they owe it to citizens to act in their interest. Establishing such a fiduciary relationship requires both procedural oversight and a bureaucratic ethos that orients 'its occupants' practical judgment toward public purposes' (Cordelli p. 104). A bureaucratic ethos thus rules out free purposiveness, or the free choice of one's ends. This lack of free purposiveness is, Cordelli argues, not a problem for the bureaucrat, who is only supposed to act from public ends. But it is a problem for the private actor. Private actors can choose their own purposes and pursue a plurality of goals, which is valuable for their own self-rule (Cordelli pp. 222–225). In a capitalist economy, most firms choose to maximize profit. Thus, firms who are contracted by the state to act in its name have conflicting motivations: they have public aims inherited from the delegation of this task from the state, and their own private aim of maximizing profit. Acting on the latter motivation in the provision of public services is an illegitimate exercise of unilateral power. But, any attempt to constrain firms' free purposiveness would undermine freedom of association. Thus, privatization comes at a heavy normative cost, whether or not private actors are constrained to act as fiduciaries.

However, there is neither as much of a descriptive nor normative difference between these two types of actors as Cordelli claims. Bureaucrats, I will argue, have more free purposiveness than Cordelli supposes, and private actors have less. Nor it is undesirable that private actors sometimes have their discretion constrained by requirements of justice, and that bureaucrats occasionally act outside their mandate.

On the one hand, bureaucrats' fiduciary role introduces more free purposiveness than Cordelli acknowledges. One source of free purposiveness is the independence of administrative agencies. Administrative agencies tend to be insulated from political pressures through independence from the legislature, as Cordelli discusses. And, many bureaucrats themselves are committed to this independence, evinced by the concern they express when this independence is threatened, and the actions they take to counter threats to this independence.⁴ If the independence of administrative agencies is important to achieve substantive justice, then it is permissible for administrative agencies to be motivated by their own independence, or the long-term stability of the agency.

A second source of free purposiveness is the bureaucratic discretion needed to apply policy rules in a context. Here I will draw heavily on work by Bernardo Zacka (2017). Time and resource-limited street-level bureaucrats often need to make difficult tradeoffs between competing values. Over time, such choices lead bureaucrats to develop particular role conceptions, which are bolstered by dispositions to perceive, judge, and act out of that role conception. The worry about free purposiveness here is not merely that bureaucrats need to use their own judgment to resolve conflicting goals.⁵ Instead, their individual dispositions, developed in response to a local organizational culture and the pressures of the job, lead them to systematically privilege some reasons of justice over others. Even though a bureaucrat is acting for reasons of justice, we still have reason to worry about the imposition of a unilateral will upon those affected. Local variation in decision-making heuristics between individuals, as well as between different offices of a single administrative agency, may make it difficult to develop the degree of uniform decision-making that is necessary to prevent exercises of power from being unilateral.⁶ Zacka's work on street-level bureaucratic discretion gives us reason to question whether Cordelli is right to claim that free purposiveness in the face of conflicting reasons is morally permissible if all the reasons are grounded in the pursuit of justice.

On the other hand, private actors also have less free purposiveness than Cordelli's argument assumes. It is telling that Cordelli's arguments about the moral problem of privatization focus on firms' motivation to maximize profit. The necessity of working, few paths to desirable jobs and privileging of an arbitrary set of talents in desirable positions (Fishkin, 2013), employer monopsony in the labor market, and workplace hierarchy (Anderson, 2017; Gonzalez-Ricoy, 2014) mean that most workers do not exercise any valuable freedom of association in working or at work. For firms in a capitalist marketplace, the need to maximize profit also limits their free purposiveness. Say individuals form a democratically-run workplace cooperative to build tables. The cooperative must acquire capital on terms set by others, and must produce tables more efficiently than its competitors so as to avoid bankruptcy. That need to make a profit will determine the hours they work, the pay they set for themselves, and so on. Workers and firms thus do not enjoy much free purposiveness in capitalist economies (Vrousalis, 2019).

There is, therefore, not as sharp a distinction between the free purposiveness of bureaucrats and private contractors as Cordelli claims. Bureaucratic independence and profit are the necessary means for the respective type of organizations to continue to exist over time and to fulfill their function, given the institutional structures in which they operate. And, administrative independence and private profit are both troubling, from the perspective of procedural legitimacy. Cordelli's book gives a nuanced and detailed analysis of the various problems that the profit motive creates for legitimacy (Cordelli pp. 171–174). Similar

tensions arise for administrative agencies. For example, during and after the 2008 financial crisis, central banks sought to depoliticize the use of new monetary tools that have significant distributive consequences, such as an increase in wealth inequality (Bank of England, 2012). To pursue substantive justice, central banks and other agencies require independence; but, such moves to protect independence also undermine top-down and bottom-up control by painting administrative activity as merely technocratic, and sideline the value of more democratic control of agency decisions. Here we see a tension between substantive justice, as well as agencies' fiduciary role, and the demands of procedural legitimacy.

This brings us to my final argument, that it is sometimes valuable for private citizens to act as agents of justice, and for bureaucrats to act outside their mandates. As Lisa Herzog (2021) argues, quasi-public, front-line actors may be better able to deliver justice for a particular community or group than a bureaucrat. One reason is that such front-line workers, such as members of a local school board or a foster care institution, tend to weight the interests of those under their care more heavily than those outside of it. In unjust societies, particular communities will be disrespected or marginalized from their fair share of the collective product; partiality is thus a desirable moral corrective to injustice. And even in just societies, justice may demand local partiality or bending the rules, as rules privilege some circumstances or talents over others (Schaar, 1967). Bureaucracies, by contrast, aim for standardization and impartiality at all levels of the hierarchy, and need to coordinate policy across many different constituencies in a country. A bureaucrat acting within her mandate may deliver justice well for the average citizen, but may not do so for the person in front of her.

Furthermore, a greater responsiveness to the needs of those in one's locale helps to inculcate valuable caring dispositions. Both bureaucrats and private actors work in organizations whose structures and functions discourage caring about those they serve (Maguire, 2022). It is telling that Zacka's front line bureaucrats share some of the same dispositions with members of Cordelli's case of WorkOpts: treating workers in a standardized manner, with a focus on fast placement (Zacka 2017; Cordelli p. 172). Standardization and efficiency are desirable at an individual and organizational level, but they ought to be balanced out by care.

Finally, acting as an agent of justice in the workplace can be valuable for the autonomy of non-bureaucrats. To be self-determining, members of a political community need to see themselves as active agents who are capable of shaping the policies of that political community. However, most people spend most of their time in paid or unpaid work, and the rest cultivating personal relationships or individual excellences. Furthermore, as I argued above, it is doubtful that the workplace is a site of free purposiveness for most workers. Constraining individuals to take on public purposes at work,

and organizing their workplace culture around considerations of justice, is one means to create the conditions for more political participation.

Notes

1. Satisfying what Cordelli calls the *principle of rational independence* (p. 60).
2. Satisfying what Cordelli calls the *rightful honor* condition of freedom (p. 64).
3. This point does not assume that individual citizens have decision-making power, unless they are the pivotal voter (although for arguments that individuals have power in virtue of being part of a group where others want what you want, see, Abizadeh, 2021). Thanks to one of the anonymous reviewers for encouraging me to clarify this point.
4. One example is central bankers' concern that the use of unconventional monetary tools during the 2008 financial crises would threaten their independence (Group of 30 2015).
5. Although, I think this individual-level discretion is more worrying that Cordelli admits, as bureaucrats are not resolving tensions between values through further democratic deliberation nor technical expertise, as Cordelli (p. 181) suggests they ought.
6. Cordelli discusses this coordination desideratum on p. 271.

Acknowledgments

I would like to thank Julie Rose, Chiara Cordelli, and two anonymous reviewers for comments and discussion.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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