

9. *The Delegation of Legislative Powers*

Congress should

- require all “lawmaking” regulations to be affirmatively approved by Congress and signed into law by the president, as the Constitution requires for all laws; and
- establish a mechanism to force the legislative consideration of existing regulations during the reauthorization process.

Separation of Powers: The Bulwark of Liberty

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.

—Montesquieu, *The Spirit of the Laws*

Article I, section 1, of the U.S. Constitution stipulates, “All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives.” Article II, section 3, stipulates that the president “shall take care that the laws be faithfully executed.” Thus, as we all learned in high school civics, the Constitution clearly provides for the separation of powers between the various branches of government.

The alternative design—concentration of power within a single governmental body—was thought to be inimical to a free society. John Adams wrote in 1776 that “a single assembly, possessed of all the powers of government, would make arbitrary laws for their own interest, and adjudge all controversies in their own favor.” James Madison in *Federalist* no. 47 justified the Constitution’s separation of powers by noting that it was a necessary prerequisite for “a government of laws and not of men.” Further, he wrote, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and

whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

For the first 150 years of the American Republic, the Supreme Court largely upheld the original constitutional design, requiring that Congress rather than administrators make the law. The suggestion that Congress could broadly delegate its lawmaking powers to others—particularly the executive branch—was generally rejected by the courts. And for good reasons. First, the Constitution was understood to be a document of enumerated and thus limited powers, and nowhere was Congress either explicitly or even implicitly given the power to delegate. Second, the fear of power concentrated in any one branch still animated both the Supreme Court and the legislature. Third, Americans believed that those who make the law should be directly accountable at the ballot box.

The upshot was that the separation of powers effectively restrained federal power, just as the Founders had intended. As Alexis de Tocqueville observed, “The nation participates in the making of its laws by the choice of its legislators, and in the execution of them by the choice of agents of the executive government.” He also observed that “it may also be said to govern itself, so feeble and so restricted is the share left to the administrators, so little do the authorities forget their popular origins and the power from which they emanate.”

The New Deal: “Delegation Running Riot”

The sense of political crisis that permeated the 1930s effectively buried the nondelegation doctrine. In his first inaugural address, Franklin Roosevelt compared the impact of the ongoing economic depression to a foreign invasion and argued that Congress should grant him sweeping powers to fight it.

Shortly after taking office, Congress in 1933 granted Roosevelt virtually unlimited power to regulate commerce through passage of the Agricultural Adjustment Act (which authorized the president to increase agricultural prices via administrative production controls) and the National Industrial Recovery Act (known as the NIRA), which authorized the president to issue industrial codes to regulate all aspects of the industries they covered.

The Supreme Court, however, temporarily arrested the tide in 1935 in its unanimous opinion in *A.L.A. Schechter Poultry Corp. v. United States*. The Court overturned the industrial code provisions of the NIRA, and, in a separate opinion, Justice Benjamin Cardozo termed the NIRA—and thus the New Deal—“delegation running riot.” That same year, the Court

struck down additional NIRA delegations of power in *Panama Refining Co. v. Ryan*.

Largely because of the *Schechter* and *Panama Refining* decisions, President Roosevelt decried the Court's interference with his political agenda and proposed legislation enlarging the size of the Court so that he could appoint additional justices—the so-called Court-packing plan. He lost that battle but won the war. Although the Court never explicitly reversed its 1935 decisions and continues to articulate essentially the same verbal formulas defining the scope of permissible delegation—indeed, *Schechter* and *Panama Refining* theoretically are good law today—it would be nearly 40 years before the Court again struck down business regulation on delegation grounds.

As long as Congress articulates some intelligible standard (no matter how vague or arbitrary) to govern executive lawmaking, courts today are prepared to allow delegation, in the words of Justice Cardozo, to run riot. John Locke's admonition that the legislature "cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others" is a forgotten vestige of an era when individual liberty mattered more than administrative convenience. As Federal District Judge Roger Vinson wrote in *United States v. Mills* in 1989, "A delegation doctrine which essentially allows Congress to abdicate its power to define the elements of a criminal offense, in favor of an un-elected administrative agency such as the [Army] Corps of Engineers, does violence to this time-honored principle. . . . Deferent and minimal judicial review of Congress' transfer of its criminal lawmaking function to other bodies, in other branches, calls into question the vitality of the tripartite system established by our Constitution. It also calls into question the nexus that must exist between the law so applied and simple logic and common sense. Yet that seems to be the state of the law."

Delegation: The Corrosive Agent of Democracy

The concern over congressional delegation of power is not simply theoretical and abstract, for delegation does violence, not only to the ideal construct of a free society, but also to the day-to-day practice of democracy itself. Ironically, delegation does not help to secure "good government"; it helps to destroy it.

Delegation Breeds Political Irresponsibility

Congress delegates power for much the same reason that Congress ran budget deficits for decades. With deficit spending, members of Congress can claim credit for the benefits of their expenditures yet escape blame for the costs. The public must pay ultimately, of course, but through taxes levied at some future time by some other officials. Likewise, delegation allows legislators to claim credit for the benefits that a regulatory statute airily promises yet escape the blame for the burdens it will impose, because they do not issue the laws needed to achieve those high-sounding benefits. The public inevitably must suffer regulatory burdens to realize regulatory benefits, but the laws will come from an agency that legislators can then criticize for imposing excessive burdens on their constituents.

Just as deficit spending allows legislators to appear to deliver money to some people without taking it from others, delegation allows them to appear to deliver regulatory benefits without imposing regulatory costs. It provides, in the words of former Environmental Protection Agency deputy administrator John Quarles, “a handy set of mirrors—so useful in Washington—by which politicians can appear to kiss both sides of the apple.”

Delegation Is a Political Steroid for Organized Special Interests

As Stanford law professor John Hart Ely has noted, “One reason we have broadly based representative assemblies is to await something approaching a consensus before government intervenes.” The Constitution was intentionally designed to curb the “facility and excess of law-making” (in the words of James Madison) by requiring that statutes go through a bicameral legislature and the president.

Differences in the size and nature of the constituencies of representatives, senators, and the president—and the different lengths of their terms in office—increase the probability that the actions of each will reflect a different balance of interests. That diversity of viewpoint, plus the greater difficulty of prevailing in three forums rather than one, makes it far more difficult for special-interest groups or bare majorities to impose their will on the totality of the American people. Hence, the original design effectively required a supermajority to make law as a means of discouraging the selfish exercise of power by well-organized but narrow interests.

Delegation shifts the power to make law from a Congress of all interests to subgovernments typically representative of only a small subset of all

interests. The obstacles intentionally placed in the path of lawmaking disappear, and the power of organized interests is magnified.

That is largely because diffuse interests typically find it even more difficult to press their case before an agency than before a legislature. They often have no direct representation in the administrative process, and effective representation typically requires special legal counsel, expert witnesses, and the capacity to reward or to punish top officials through political organization, press coverage, and close working relationships with members of the appropriate congressional subcommittee. As a result, the general public rarely qualifies as a “stakeholder” in agency proceedings and is largely locked out of the decisionmaking process. Madison’s desired check on the “facility and excess of law-making” is thus smashed.

Delegation Breeds the Leviathan State

Perhaps the ultimate check on the growth of government rests in the fact that there is only so much time in a day. No matter how many laws Congress would like to pass, there are only so many hours in a session to do so. Delegation, however, dramatically expands the realm of the possible by effectively “deputizing” tens of thousands of bureaucrats, often with broad and imprecise missions to “go forth and legislate.” Thus, as columnist Jacob Weisberg has noted in the *New Republic*, “As a labor-saving device, delegation did for legislators what the washing machine did for the 1950s housewife. Government could now penetrate every nook and cranny of American life in a way that was simply impossible before.”

The Threadbare Case for Delegation

Although delegation has become so deeply embedded in the political landscape that few public officials even recognize the phenomenon or the issues raised by the practice, political observers are becoming increasingly aware of the failure of delegation to deliver its promised bounty of good government.

The Myth of Technical Expertise

It was once maintained that delegation produces more sensible laws by transferring lawmaking from elected officials, who are beholden to concentrated interests, to experts, who can base their decisions solely on a cool appraisal of the public interest. Yet most agency heads are not scientists, engineers, economists, or other kinds of technical experts; they are political operatives. Since the Environmental Protection Agency’s

inception in 1970, for example, seven of its eight administrators and seven of its nine assistant administrators for air pollution have been lawyers. As MIT professor Michael Golay wrote in *Science*, “Environmental protection policy disagreements are not about what to conclude from the available scientific knowledge; they represent a struggle for political power among groups having vastly differing interests and visions for society. In this struggle, science is used as a means of legitimizing the various positions . . . science is a pawn, cynically abused as may suit the interests of a particular protagonist despite great ignorance concerning the problems being addressed.” Perhaps that’s why the EPA’s own Science Advisory Board was forced to concede in a 1992 report that the agency’s science “is perceived by many people both inside and outside the agency to be adjusted to fit policy.”

We should not necessarily bemoan the lack of agency expertise, for it is not entirely clear that government by experts is superior to government by elected officials. There is no reason to believe that experts possess superior moral knowledge or a better sense of what constitutes the public good. Indeed, specialization often impairs the capacity for moral judgment and often breeds professional zealotry. Likewise, specialized expertise provides too narrow a base for the balanced judgments that intelligent policy requires.

Although both agency administrators and legislators often lack the expertise to evaluate technical arguments by themselves, they can get help from agency and committee staff, government institutes (like the Centers for Disease Control or the General Accounting Office), and private sources such as medical associations, think tanks, and university scientists. After all, that is what the hearings process is supposed to be about.

And only someone naive about modern government would seriously claim today that the winds of politics blow any less fiercely in administrative meeting rooms than they do in the halls of Congress. As Nobel laureate economist James Buchanan and others have observed, public choice dynamics provide a multitude of incentives for public officials to pursue both private and political ends that often have little to do with their ostensible missions.

Is Congress Too Busy?

New Dealers once argued that “time spent on details [by Congress] must be at the sacrifice of time spent on matters of the broad public policy.” But Congress today spends little time on “matters of broad public

policy,” largely because delegation forces Congress to spend a large chunk of its time constructing the legislative architecture—sometimes over a thousand pages of it—detailing exactly how various agencies are to decide important matters of policy. Once that architecture is in place, members of Congress find that a large part of their job entails navigating through those bureaucratic mazes for special interests jockeying to influence the final nature of the law. Writing such instructions and performing agency oversight to ensure that they are carried out would be unnecessary if Congress made the rules in the first place.

Moreover, delegation often works to prolong disputes and keep standards of conduct murky because pressures from legislators and the complicated procedures imposed upon agencies turn lawmaking into an excruciatingly slow process. Agencies typically report that they have issued only a small fraction of the laws that their long-standing statutory mandates require. Competing interests devote large sums of money and many of their best minds to this seemingly interminable process. For example, it took the EPA 16 years to ban lead in gasoline despite the fact that the 1970 Clean Air Act explicitly gave them the authority to do so. Simply making the rules the first time around in the legislative process would take less time than the multiyear regulatory sausage machine requires to issue standards.

Complex Rules for a Complex World

Perhaps the most widely accepted justification for some degree of delegation is the complex and technical nature of the world we live in today. As the Supreme Court opined in 1989, “Our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”

Yet the vast majority of decisions delegated to the executive branch are not particularly technical in nature. They are instead hotly political, for the reasons mentioned above. If Congress must regulate, it could (and probably should) jettison micromanagerial command-and-control regulations that make up the bulk of the *Federal Register* and instead adopt regulations that are less prescriptive and more performance based or market oriented. Most regulatory analysts on both the left and the right agree that this would also have the happy consequences of decreasing regulatory costs, increasing regulatory efficiency, and decreasing the burden on regu-

lators. In addition, a Congress not skewed toward regulation by delegation would rediscover practical reasons for allowing many matters to be left to state and local regulators.

Conclusion

Forcing Congress to vote on each and every administrative regulation that establishes a rule of private conduct would prove the most revolutionary change in government since the Civil War—not because the idea is particularly radical, but because we are today a nation governed, not by elected officials, but by unelected bureaucrats. The central political issues of the 106th Congress—the complex and heavy-handed array of regulations that entangle virtually all manner of private conduct, the perceived inability of elections to affect the direction of government, the disturbing political power of special interests, the lack of popular respect for the law, the sometimes tyrannical and self-aggrandizing exercise of power by government, and populist resentment of an increasingly unaccountable political elite—are but symptoms of a disease largely caused by delegation.

“No regulation without representation!” would be a fitting battle cry for the 106th Congress if it is truly interested in fundamental reform of government. It is a standard that both the left and the right could comfortably rally around, given that many prominent constitutional scholars, policy analysts, and journalists—from Nadine Strossen, president of the American Civil Liberties Union, to former judge Robert Bork—have expressed support for the end of delegation. Several pieces of legislation (H.R. 1036, with 67 House cosponsors, H.R. 4096 with 62 cosponsors, and S. 433 with 12 Senate cosponsors) were introduced in the 105th Congress to accomplish exactly that.

Of course, forcing Congress to take full and direct responsibility for the law would not prove a panacea. The legislature, after all, has shown itself to be fully capable of violating individual rights, subsidizing special interests, writing complex and virtually indecipherable law, and generally making a hash of things. But delegation has helped to make such phenomena, not the exception, but the rule of modern government. No more crucial—and potentially popular—reform awaits the attention of the 106th Congress.

Suggested Readings

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- Breyer, Stephen. "The Legislative Veto after Chadha." Thomas F. Ryan lecture. *Georgetown Law Journal* 72 (1984).
- Lawson, Gary. "The Rise and Rise of the Administrative State." *Harvard Law Review* 107 (1994).
- Lowi, Theodore. *The End of Liberalism: The Second Republic of the United States*. 2d ed. New York: W. W. Norton, 1979.
- Schoenbrod, David. *Power without Responsibility: How Congress Abuses the People through Delegation*. New Haven, Conn.: Yale University Press, 1993.
- Smith, Nick. "Restoration of Congressional Authority and Responsibility over the Regulatory Process." *Harvard Journal on Legislation* 33 (1996).

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