

## An Elegant but Incomplete Analysis of Delegation

Reviewed by David Schoenbrod

### DELEGATING POWERS: A Transaction Cost Politics Approach to Policy Making Under Separate Powers

by David Epstein and Sharyn O'Halloran

250 pp. Cambridge:

Cambridge University Press, 1999

**F**OR CONGRESS, THE CHOICE between making policy or delegating policymaking power to an agency is like a private business's choice between making a component or buying it from a vendor. That analogy is the departure point of David Epstein and Sharyn O'Halloran's new and important book. The analogy proves splendidly fruitful, generating empirically supported insights not only into the factors that cause Congress to make policy or "buy" it from agencies but also into the forces that shape how Congress organizes committees and oversees agencies.

### DECIDE OR DELEGATE; MAKE OR BUY

BORROWING THE APPARATUS THAT economists use to explain firms' make-or-buy decisions, political scientists Epstein and O'Halloran construct a simple but elegant model of Congress's decide-or-delegate decisions. The protagonist in their model is the median legislator who faces pitfalls in either choice. If Congress decides, the policy outcome may be suboptimal because the legislative committee (a) sneaks in

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statutory provisions that deviate from the median legislator's desires or (b) produces a stinker of a result by inaccurately forecasting the effects of its statutory provisions. If Congress delegates to an agency, the agency may be able to produce better results for the median legislator because of its access to expertise or ability to make post-enactment course corrections. But the agency can also produce worse results, from the median legislator's perspective, if it has different objectives.

### SUCCESS IN DESCRIPTION

USING THE MAKE-OR-BUY MODEL, THE authors make these predictions:

- When government is divided, Congress is less likely to delegate and delegations are more likely to be to agencies insulated from direct presidential control.
- Legislators from the president's party are more likely to support delegation.
- The preferences of committees will move opposite to changes in the preferences of the executive and will move closer to the preferences of Congress as a whole.
- Congress is more likely to delegate when the preferences of the committee deviate from the preferences of Congress as a whole.
- The more cohesive the majority party in Congress the less authority will be delegated.
- Congress will delegate less discretion when the legislation is referred to more than one committee or when the

bill is passed under restrictive procedures.

- Congress will delegate more discretion in areas where policymaking requires intensive information.

These interesting predictions—and there are more—would seem difficult to test, but the authors found ways to do the job. Their database consists of 257 major bills considered by Congress from 1947 to 1992, from which they tease out proxies for their variables. To make a long story short, all of their predictions are borne out in full by more statistical methods than I ever forgot.

Epstein and O'Halloran's elegantly developed theoretical model and comprehensive empirical results are just the beginning. Other analysts will use their model and data to investigate questions related to Congress's delegation decisions. For example, at a forum on delegating powers at the 1999 convention of the American Political Science Association, two of my fellow panelists, Professors Daniel Carpenter and John Ferejohn, suggested that the book's methods could be used to shed light on the factors that influence congressional decisions about allocating power to the federal, state, or local level of government or to agencies or courts. Other political scientists will suggest improvements in Epstein and O'Halloran's methodology.

The point is that at the very beginning at their academic careers (they are associate professors at Columbia University) they have created a new technique that marries two previously disparate political science disciplines—the study of Congress's internal organization and the study of Congress-executive branch relationships.

### PROBLEMS IN PRESCRIPTION

BRILLIANT AS THE BOOK IS, IT IS LESS

than brilliant when the authors turn from description, their main task, to prescription. They say there is no reason to worry about the rising power of the administrative state, basing their opinion on their findings that recent Congresses have granted no more discretion to agencies than did the Congresses of the 1940s and 1950s. But, as Carpenter and Ferejohn pointed out, if Congress has steadily granted *new* discretionary power to the administrative state, the sum of that power may well have increased mightily. Moreover, agencies increase their power not just through action by Congress but also by steady “mission creep” and occasional bursts of “mission leap”—as when the Food and Drug Administration claimed control of tobacco.

**A Key Omitted Variable** The key prescriptive error in the book is this: “In our view, delegation is a self-regulating system not in need of closer attention from the judiciary” (p. 238). That opinion is unsupported by the book’s descriptive model because it is built upon the assumption that Congress delegates only to get the policy results sought by legislators and not to let legislators strike politically attractive poses. But, as Professor David Mayhew concludes, “In a large class of legislative undertakings the electoral payment is for positions rather than for effects” (p. 132 of *Congress: The Electoral Connection* [New Haven: Yale University Press, 1986]). Delegation allows legislators the opportunity to claim credit for the benefits of a statute, but to shift the blame for part of the costs to an agency. If, as Mayhew concludes, legislators delegate to fool constituents rather than to produce the policy effects they want, then the authors have no normative basis for concluding that the decision whether to delegate can happily be left to the cross talk between Congress and the executive branch.

**Blameshifting** Epstein and O’Halloran understand that blameshifting is identified in the political science literature

as a motivation for delegation, but they decide to leave it out of their descriptive model for two reasons. The first reason is this: “The theory [that Congress delegates to shift blame] implies that constituent benefits will be delivered via delegation, while broad, general policy benefits will be passed in the legislature. This assumption runs counter to the usual notion that legislators are engaged almost entirely in providing constituency benefits through pork barreling and casework” (p. 32).

In concluding that the blameshifting theory of delegation does not fit experi-

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ence, the authors misunderstand the theory. Scholars in the field (notably Professor Morris Fiorina) argue that whether legislators find it politically beneficial to delegate depends not only on the size of the group that benefits but also on the degree to which delegation causes legislators to lose credit for benefits and the degree to which delegation shifts blame for costs to the agency. (See Fiorina’s “Group Concentration and Delegation of Legislative Authority” in *Regulatory Policy and Social Science*, edited by Roger G. Noll [Berkeley: University of California Press, 1985]). My book on delegation, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven: Yale University Press, 1993), which Epstein and O’Halloran cite, uses Fiorina’s theory to predict the results that Epstein and O’Halloran claim it cannot explain.

Epstein and O’Halloran’s second reason to neglect blameshifting is not just wrong, but bizarre. They write: “For [the blameshifting] logic to work, voters must constantly be fooled by delegation, lacking any political entrepreneur to inform them of its deleterious nature” (pp. 32-33). By such reasoning, there are no problems in our polity

because any alleged problems either have been fixed or are imaginary. If only it were so.

There are real reasons why real problems go unsolved, and among those unsolved, nonimaginary problems is delegation. A legislator who argues that a bill should not be passed because it delegates will have to come down on one side or the other of the politically difficult choice that delegation is being used to evade and so will pay the political price that the rest of Congress wants to avoid. The willingness to object to delegation in the context of specific bills is not a survival trait among legislators.

Nonetheless, complaints from constituents about delegation have registered among the political entrepreneurs on Capitol Hill. Claiming to respond to complaints about agency discretion, legislators enacted the Congressional Review Act,

which lets legislators decide whether to vote on repealing new agency regulations. As such, it gives legislators the option of taking responsibility. Guess what? They do not want it and have hardly ever used the act to take it.

Another piece of legislation, the Congressional Responsibility Act, sponsored by Rep. J.D. Hayworth, some seventy other members of the House, Sen. Sam Brownback, and a dozen other senators, would make responsibility a mandate rather than an option. It would provide that a new agency regulation could not go into effect unless enacted by Congress. The bill, which I helped to draft, is based on a proposal floated in a law review article by Justice Stephen Breyer, in which he suggested expedited procedures to speed routine regulations through the legislative pipeline. Although sponsorship of such prodemocracy legislation is politically advantageous to individual members, earning them much praise from constituents, the passage of such legislation would be politically disadvantageous to congressional leadership because it would force hard choices. The leadership in Congress is blocking serious consideration of the bill.

Popular complaints about delegation are reflected also in bills dealing with specific topics. After Congress delegated broad authority over air pollution in 1967, Ralph Nader blasted Sen. Edmund Muskie for putting progress on pollution into a political limbo. Muskie responded with the 1970 Clean Air Act, which, he said, “faced the hard choices with candor.” But Congress faced only one hard choice about one source of pollution—new cars—and as to them left itself an escape hatch. As to the rest, the act delegated again, but hid the legislators’ failure to take responsibility about the substantive choices that really matter—how clean to make the air and upon whom to impose the cleanup burden—by imposing a truckload of procedural instructions on the Environmental Protection Agency (EPA). In other words, Congress found a way to micromanage the agency and yet to shift blame to it by delegating the hard choices.

**Delegation vs. Micromanagement** Many lawyers and political scientists get confused about the difference between delegation and micromanagement. Epstein and O’Halloran are among the confused. When they speak of delegation, they mean micromanagement. That does not make their descriptive work any less useful. But what they so brilliantly describe is micromanagement, not delegation in the constitutional sense. That description should have no persuasive power in deciding what the courts should do about delegation.

Delegation is a concept of constitutional law and so must be understood from the perspective of the Constitution’s purposes. The most important and relevant purposes are to make government functional and accountable to voters. The Revolutionary War was fought to constrain the coercive power of the state through accountability. Thus “No taxation without representation.”

But, when the Constitution assigns to Congress—and to no one else—the

power to regulate and tax, it did not require Congress to undertake all aspects of regulation and taxation. Rather, as the Supreme Court interpreted the Constitution in its first century, Congress must establish the rules of conduct as to regulation and taxation, or at least make the significant choices needed to put such rules into place. For Congress to do more, to go beyond making the generally applicable rules into micromanagement, would make government less functional and less accountable. As Justice Lewis Powell stated in *Chadha v. INS*, “Congress is most accountable politically when it prescribes rules of general

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applicability.”

Some examples will illustrate the difference between delegation and micromanagement. Congress wrote a subsection of the 1990 Clean Air Act to require EPA to respond to each toxic chemical by issuing regulations for each industry that require all plants to bring emission rates down to the level achieved by those plants in the twelfth percentile of cleanliness. Thus, in relatively few words, Congress could state the rule without getting into the details of every pollutant or every industry that emits that pollutant. Nonetheless, Congress made itself responsible for striking the balance between the competing claims of environmentalists and industry. Disappointed environmentalists and industrialists know precisely whom to blame for the resulting regulations.

Consider, in contrast, what happens under most of the rest of the Clean Air Act and, indeed, under most environmental legislation. Congress ordains that the agency protect health and keep an eye on the costs of pollution control. There is no standard for how clean to make the air because, for

most pollutants, there is no sharp dividing line between health and danger but only a continuum of more or less risk. As the father of the original Clean Air Act, Sen. Edmund Muskie, later acknowledged, “Our public health scientists and doctors have told us that there is no threshold, that any air pollution is harmful. The Clean Air Act is based on the assumption, although we knew at the time it was inaccurate, that there is a threshold.” By this intentional inaccuracy—that is to say, lie—Congress ducked taking responsibility for striking the balance.

There is also no standard for how to allocate the burden for cleaning up the environment. EPA can pick and choose among subcategories of firms, deciding to go easy on some and harder on others. (Plenty of room for shenanigans here.) And, whatever regulations finally get imposed, legislators can deny responsibility because the choices were up to the agency.

To make the significant choices, Congress need not state its general rules numerically. Congress did enough, for example, when it prohibited employers from discriminating on the basis of gender except where there is a bona fide occupational qualification. That standard leaves many questions to be resolved industry by industry, but nonetheless provides a benchmark by which to resolve them.

Because of their misunderstanding of the constitutional concept of delegation, Epstein and O’Halloran obliquely convey the mistaken impression that in stopping delegation the country must give up the efficiency that can come with the proper use of agencies; for example:

- They see efficiency in fast-track trade legislation, but mistakenly classify it as a delegation. It is not. The fast track is a way to speed trade deals through the legislative process of Article I of the Constitution. Therefore, the fast track is not a delegation of legislative power.
- They see efficiency in the base-clos-

ing commission, but mistakenly classify it as a delegation of legislative power. It is not. Although the making of rules for the regulation and taxation of private persons is a legislative function assigned exclusively to Congress under Article I of the Constitution, the management of federal property is left to the more open-ended Article IV, and under Article II the executive has considerable discretion in the management of the armed forces.

• They see efficiency in leaving the regulation of airline safety to the experts at the Federal Aviation Administration (FAA), but Congress could make use of that expertise and still take direct responsibility for airline safety. One way would be to require FAA to require the use of "best practices," emulating the subsection of the Clean Air Act that sets emissions standards

at the twelfth percentile of cleanliness in each industry. Another way would be to require Congress to enact proposed regulations. Or the agency could be allowed to choose between best practices and congressional enactment.

We should not be indifferent to Congress's choice among the many constitutional ways to delegate. Real consequences flow from agenda-setting devices, such as fast-track trade legislation and the base-closing commission, and from micromanagement. That is why Epstein and O'Halloran's description is so valuable, even though it does not describe delegation in the constitutional sense.

**Power vs. Responsibility** Finally, Epstein and O'Halloran get the critics of delega-

tion wrong when they have us saying that delegation is bad because Congress abdicates power (p. 237). Congress does not abdicate power, or at least not much. It has a hundred ways to keep some grip on agencies. What Congress abdicates is not power but responsibility. That is why the question of delegation should be a question for the courts as well as the politicians.

## CONCLUSION

MY CRITICISMS FOCUS ON ONLY A FEW pages of a long and splendid book. When Epstein and O'Halloran apply their considerable talents to incorporate blameshifting into their model and gear it to delegation in a constitutional sense—as I hope they do—we will all be in a better position to understand the true effects of Congress's abdication of its constitutional responsibility. ■

# The Costs and Benefits of User Fees—Oh, Never Mind the Costs

Reviewed by William T. Bogart

## HOME ON THE URBAN RANGE: An Idea Map for Reforming the City

by Filip Palda

117 pp. Vancouver:

The Fraser Institute, 1998

**T**HIS SHORT BOOK CAN BE SUMMARIZED briefly: User fees are good, taxes are bad. Country clubs are good, suburbs are bad. Dense is good, spread out is bad. And everyone who lives in the suburbs works downtown.

The thesis is that by imposing user fees on municipal services, citizens will see the true cost of their demands on the city and will therefore adjust

their consumption appropriately. As a result, settlement patterns will become more dense, highway congestion will be reduced, solid waste will no longer clog landfills, and democracy will become more vibrant as citizens hold elected officials accountable and elected officials respond quickly to citizens' demands.

The prose is entertaining and breezy, albeit with an edge of indignation about the current system of property taxes. Palda likens the local property tax to a "ring of invisibility" for politicians because it protects them from direct accountability for the quality of local public services. The wealth ("honey") resulting from the high productivity of cities attracts "beekeepers" that care for and increase the wealth but also "bears" that plunder it. And providing general services without

imposing user fees places "pearls before swine." Palda even goes so far as to criticize the computer game SimCity because it does not give the player the option of collecting user fees!

## THE AUTHOR'S SELECTIVITY

THE BOOK MAKES ME GRATEFUL FOR peer-reviewed academic journals. Although the cost of peer review is that it often limits advances in knowledge to tiny increments, the benefit is that authors must confront awkward facts and countervailing theoretical arguments. The author of this book is extremely selective about both the theory and the facts that he chooses to present. The net effect is to deceive the reader about the true benefits and costs of his proposed reforms.

I too am a fan of user fees, but ignoring arguments against user fees does not make those arguments go away. It is well known, for example, that Seattle imposed large user fees on garbage collection in the 1980s. In his discussion of the effects of those fees (pp. 74-75), Palda never mentions the "Seattle stomp," which reduced the volume of garbage collected by increasing its density. People will react to user fees by changing their behavior, sometimes in ways unwanted

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