THE NONDELEGATION DOCTRINE AND THE SEPARATION OF POWERS: A POLITICAL SCIENCE APPROACH

David Epstein & Sharyn O'Halloran***

INTRODUCTION

The passage of the Line Item Veto Act[1] ("LIVA") and its subsequent demise at the hands of the United States Supreme Court[2] have led to a resurgence of interest in the nondelegation doctrine. LIVA granted the President unprecedented authority to cancel not only specific spending items in appropriations bills, but certain targeted tax benefits as well. Opponents of LIVA consistently argued that it infringed on the separation of powers by delegating legislative authority to the Executive, and they urged the courts to strike it down as a violation of the nondelegation doctrine. LIVA's supporters portrayed it as good public policy and a permissible delegation of authority. *Clinton v. City of New York*[3] thus serves as a convenient lens through which to view competing theories of the nondelegation doctrine in particular, and the role of delegation in a system of separate powers more generally.

Even though LIVA was eventually overturned on grounds other than the nondelegation doctrine,[4] the majority opinion distinguished *Clinton* from *Field v. Clark*[5] by embracing what Richard

* Department of Political Science and Stanford Graduate School of Business, Columbia and Stanford University.

** Department of Political Science and the School of International and Public Affairs and Hoover Institution, Columbia and Stanford University.

The authors gratefully acknowledge funding by the National Science Foundation under grant 95-11628 and by the John M. Olin Foundation.

1 2 U.S.C. §§ 691-692 (Supp. II 1996). LIVA amends the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 31 U.S.C.). The Supreme Court held LIVA unconstitutional in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998).

2 *See* Clinton v. City of New York, 118 S. Ct. 2091 (1998).

3 *Id.*

4 LIVA was ruled unconstitutional for violating the presentment clause. In the majority opinion, Justice Stevens stated: "If the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature." *Id.* at 2108.

5 143 U.S. 649 (1892) (upholding Congress's delegation of the authority to reduce tar-

Stewart terms the "transmission belt" theory of delegation.[6] According to this view, Congress provides the Executive with a policymaking algorithm, specifying which actions are to be taken in which circumstances, leaving to the Executive only the duty of determining the facts in a particular instance. "When enacting the statutes discussed in *Field*, Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President."[7] Thus, the President did not *legislate*; Congress had made the fundamental policy decisions itself, and subsequent to any given finding of facts, the President was *obligated* to take a certain set of actions.

By taking this view of policymaking, the Court assumes away the problem of uncontrolled delegation by denying the possibility that Congress ever delegates legislative authority in the first place. All delegations according to this theory are well-regulated, with Congress laying out the policymaking program and the Executive merely filling in the details. The problem with LIVA, by this reckoning, was that it gave the President discretionary authority to change a previously enacted statute, one which made no mention of allowing the Executive to fill in any details.

The Court thus skirted the issue of delegation in *Clinton* by denying its existence outside of the case. Were this an accurate portrayal of reality, the remainder of this Article would be superfluous. This convenient stance, however, ignores the numerous cases in which the President and executive agencies are given real policymaking discretion in their own right, with either no statutory guidance or guidance that is so broad that it imposes almost no constraints on executive actions. It also fails to consider other instances of delegation, such as the Reciprocal Tariff Act of 1934,[8] which allowed the President to amend explicit policy prescriptions in previous acts of Congress.

Thus, proponents of a revitalized doctrine protest that congressional delegation of authority to the Executive is real, and that it undermines the very foundations of our representative govern-

---

iff rates under certain circumstances).

6 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675-77 (1975).

7 *Clinton*, 118 S. Ct. at 2105.

8 Pub. L. No. 73-316, 48 Stat. 943 (1934) (giving the President the authority to unilaterally reduce tariffs specified in the Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, when negotiating reciprocal agreements with foreign countries).

ment. Professors David Schoenbrod and Marci Hamilton, for instance, argue in their *amicus curiae* brief for *Raines v. Byrd*[9] (an earlier version of *Clinton v. City of New York*) that, in delegating authority to the Executive, "Congress generally avoids accountability by leaving the hard policy choices to unelected and unaccountable agencies."[10] Delegation thus leads to a dangerous concentration of power in one branch of government, hidden from public scrutiny and operating at the expense of the public good for the benefit of a few well-placed individuals.

Peter Aranson, Ernest Gellhorn, and Glen Robinson similarly construe delegation as a means of delivering private benefits to favored constituents.[11] They pose the problem as one of having legislation spelled out in statutes, in which case it will be enforced by the courts or by delegating legislative power to agencies. By having the executive branch fill in the regulatory details, Congress can shift some degree of both the credit and blame to the agency. If delegation helps Congress shift to the agency a preponderantly large part of the blame, then it will prefer agency regulations to judicially enforced statutes, and vice-versa if delegation would shift more credit to executive agents.

Elsewhere, David Schoenbrod argues forcefully that Congress oversteps its constitutional bounds when delegating broad discretion to executive agencies; that Congress could find the time and resources necessary to write detailed laws if it really wanted to; and that, in practice, delegation creates perverse incentives that lead to such nonsensical policies as burning oranges during the Great Depression.[12] "Delegation allows Congress to stay silent about [regulatory costs and benefits], so it severs the link between the legislator's vote and the law, upon which depend both democratic accountability and the safeguards of liberty provided by Article I."[13]

According to these arguments, LIVA was just the tip of the iceberg of unconstrained, unconstitutional delegation to the Executive. Advocates of an enhanced nondelegation doctrine fear that the concentration of power in one branch of government in-

---

9 117 S. Ct. 2312 (1997).

10 Brief Amicus Curiae of David Schoenbrod & Marci Hamilton in Support of Appellees, Raines v. Byrd, 521 U.S. 811 (1997) (No. 96-1671).

11 *See* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 55-63 (1982).

12 *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); *see also* David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999).

13 SCHOENBROD, *supra* note 12, at 17.

evitably leads to tyranny and a loss of individual liberty, citing *The Federalist No. 47* as affirmation: "The accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[14] One way that power can come to reside within a single branch is by the practice of Congress delegating the details of policymaking to executive agencies. As Justice Kennedy stated in his concurring opinion in *Clinton*, "Liberty demands limits on the ability of any one branch to influence basic political decisions. . . . Abdication of responsibility is not part of the constitutional design."[15] Therefore, the argument goes, to ensure liberty it is necessary to limit such delegations of authority.

We agree that unconstrained delegation does pose a threat to individual liberties. We disagree, however, with the assumption that Congress does in fact delegate, either *de jure* or *de facto*, unrestrainedly. Legislators delegate authority in those areas—such as pork barreling in appropriations bills, military base closings, and trade policy—where the legislative process produces inefficient outcomes. Congress is also wary, though, of ceding too much authority to executive branch actors who may pursue their own policy goals rather than those of the enacting legislative coalition. Legislators therefore set the limits of executive branch discretion so that these costs and benefits of delegation balance at the margin. Thus, legislators may well delegate authority to executive actors, but they will rarely, if ever, do so without constraints. Moreover, legislators will delegate those issue areas where the normal legislative process is least efficient relative to regulatory policymaking by executive agencies.

In particular, we would argue that, in the case of LIVA, delegation served as a vehicle for good public policy. The delegation of authority involved was clearly defined, and, more importantly, was targeted specifically at a problem that the normal legislative process handles poorly—the curtailing of pork barrel benefits. Perhaps, in a perfect world, legislators could have come to the same policy outcomes themselves. In reality, though, they could only choose between two flawed alternatives—the committee system or delegation to the Executive. Moreover, it is doubtful that restricting Congress's power to delegate would have engendered more fair or more effective final policy outcomes, particularly

---

[14] Clinton v. City of New York, 118 S. Ct. 2091, 2109 (1998) (Kennedy, J., concurring) (citing THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961)).

[15] *Id.* (Kennedy, J., concurring).

given Congress's predilections for logrolling and omnibus legislation.

If our theory of delegation as a balancing of competing inefficiencies is correct, the balance of power between the branches will be continuously recalibrated to reflect changing contingencies of the day. As political factors—such as constituent demands, legislators' policy goals, and partisan control of the branches of government—change, so too will the terms of delegation. In our view, this state of affairs is a testament to the health of our political system, allowing neither committees nor agencies to dominate policymaking. Congressional delegation is, therefore, a self-regulating system, and any attempts to revive the nondelegation doctrine would merely strengthen the hands of congressional committees, sub-committees, and interest groups at the expense of agencies, thereby reducing accountability and forcing Congress to make policy in exactly those areas that it handles least effectively relative to executive agencies. Delegation should, thus, be seen as a complement to, rather than a substitute for, the separation of powers.

We develop our argument by first reviewing the political science literatures on legislative organization and on congressional oversight of the bureaucracy, two areas that serve as the building blocks for our theory of delegation. Next, we explicate our argument relating to delegation and the separation of powers and derive a set of testable propositions that, if our approach is correct, should consistently predict variations in the amount of authority granted to the executive branch over time and across issue areas. This Article describes the data used to test these propositions, provides some useful summaries of changes in executive statutory discretion in the postwar era, and statistically tests our predictions. We conclude with a few remarks about the nondelegation doctrine and the role of the courts in a system of separate powers.

I. DELEGATION AND THE POLICYMAKING PROCESS

Attacks on delegation rest on three assumptions: first, legislators delegate many important policy decisions to executive agencies; second, once authority has been delegated, legislators show little interest in overseeing its exercise; and third, restricting Congress's ability to delegate will improve the quality of public policy. Hence, delegation is equivalent to the abdication of Congress's legislative duties under Article I of the Constitution, resulting in policy detrimental to the public good.

If this situation corresponded with reality, it would be clear that delegation represents a severe departure from the policy-making process originally envisioned by the Founders, and hence a threat to our system of separate powers and the individual liberties that it was meant to protect. However, we will present a theory of delegation that, if correct, contradicts the predictions that follow from these three assumptions. First, though, we briefly review the two areas of literature within political science upon which our approach is built—those on the committee system and legislative organization, and on the oversight of delegated authority. The former revolves around the committee system and its impact on policy outputs, while the latter focuses on the means by which 535 relatively uninformed legislators can monitor the actions of a vast federal bureaucracy.

A. *Legislative Organization*

To understand policymaking through the committee system, it is convenient to begin with David Mayhew's book, *The Electoral Connection*,[16] which lays out a vision of congressional organization as a rationally constructed, conscious choice made by reelection-seeking individuals. Mayhew emphasized the importance of the committee system as a basis for members to pursue their electoral goals through the activities of advertising, position taking, and credit claiming. Legislators, thus, use committees as platforms to translate their constituents' preferences into policy outcomes. Mayhew's study remains influential mainly due to its methodological focus: it took a ground-up view of legislative organization and built upon this edifice a theory of public policy.

The second strand of modern theories of Congress has its roots in what has come to be known within political science as the *new institutionalism*.[17] Its key premise is that "institutions matter," meaning that in the details of legislative procedures—including

---

16 DAVID MAYHEW, THE ELECTORAL CONNECTION (1974).

17 Key articles in this tradition include: Arthur T. Denzau & Robert J. Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 AM. J. POL. SCI. 740 (1983); Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agencies, and the Status Quo*, 33 PUB. CHOICE (Issue No. 4), at 27-43 (1978); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979). Book-length expositions include excellent works by: STANLEY BACH & STEVEN S. SMITH, MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES: ADAPTATION AND INNOVATION IN SPECIAL RULES (1988); WALTER OLESZECK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (3d ed. 1989); STEPHEN SMITH, CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE (1989).

floor voting and amendment rules, committee referral precedents, and conference committee proceedings—lie the secrets of congressional power. What Congress did was seen as inseparable from how it did it. Thus, a number of studies concerning the theoretical properties of amendment agendas, gatekeeping powers, and proposal rights, were launched. All of these studies showed the links between institutional arrangements and policy outcomes.

As with Mayhew, the committee system took center stage in this line of reasoning, solving a distributional puzzle: how to pass programs that benefit a few members intensely when all floor votes must be made by majority rule? The answer was that, via the committee system, legislators requested (and were granted) membership on the committees that most directly affected their constituents. Committees could legislate on their subject areas in peace, free from outside interference. These committee jurisdictions were upheld through the use of various procedural devices: gatekeeping powers, closed rules, and domination of conference committees. Thus, legislative organization is designed to maximize district-specific benefits and help ensure members' reelection. Weingast and Marshall capped off a decade of research with a summary of this *distributive view* of congressional organization (a rather cynical view, which makes very little mention of which policies are good for the nation as a whole) in their article, *The Industrial Organization of Congress*.[18]

An alternative view of the committee system posits that the central problem facing legislators is producing reasonable policy in the face of an uncertain, complex environment. Committees, once again, solve this problem: they are populated by experts who put their expertise to work when fashioning legislation. Therefore, any procedural advantages that committees receive, such as closed rules, can be read as inducements to gather information, and any deference they receive on the floor is due to their superior expertise. This *informational theory* of committees (much less cynical than the distributive view, but still not necessarily wrong) is laid out at length by Krehbiel[19] and complements the distributive theory's emphasis on the provision of particularistic benefits.

Despite their different emphases, both approaches share much in common when describing legislative action. First, both analyses put committees at the forefront by emphasizing the role

---

[18] Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988).

[19] *See* KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991).

committee power plays, even if the two sides cannot agree on its basis. This committee-based structure is no accident. Legislators designed it this way, along with its attendant procedural accouterments, in order to pass legislation that maximizes their reelection chances. Under both views, the committee system has built-in inefficiencies. For the distributive view, it is unrestrained logrolling, the most spectacular instance of which is probably the Smoot-Hawley Tariff Act of 1930,[20] but less disastrous examples of wasteful pork barrel legislation occur every session. For the informational view, the problem is that committees and floor members may differ in their preferences, so policymaking will display some residual uncertainty over outcomes, unable to fully incorporate committees' expertise.

Moreover, neither theory provides much support for the proposition that decreased delegation improves the quality of public policy. Commissioning legislators with making even more of the fine policy details would only exacerbate their informational dilemmas, considering the fact that even giving bureaucrats more explicit goals and guidelines for the exercise of delegated authority requires significant time and expertise. In addition, it undermines one of the primary reasons for delegating in the first place—the ability of agencies to respond flexibly to changing conditions. Furthermore, committees have shown themselves to be quite adept at providing pork barrel benefits through omnibus legislation, so it is not clear how shifting a greater legislative burden to them will decrease the provision of particularistic policy. As Farber and Frickey note, "A classic example of rent seeking was the Smoot-Hawley tariff, in which the statute provided enough numerical certainty to satisfy the most dedicated opponent of delegation. The arduous task of developing the numbers was largely left to the industries themselves, which had a field day writing the statute."[21]

B. *Delegation and Oversight*

Our other building block comes from the recent literature discussing administrative procedures, in which a long normative debate has taken a positive turn. As noted above, those in favor of a strengthened nondelegation doctrine base their arguments on the hypothesis that delegation is equivalent to Congress's abdicating its legislative prerogatives. Some social scientists have echoed

---

[20] Pub. L. No. 71-361, 46 Stat. 590 (1930).

[21] DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 86 (1991).

these concerns as well. For instance, the "original sin" hypothesis advanced by Stigler asserts that bureaucracies are created by politicians specifically to serve constituents' needs, with the amount of protection being determined by the point where supply meets demand; that is, where the costs to the politician of adding more protection equal the benefits to the affected constituents.[22]

This point was also argued vigorously by Lowi, who accused legislators of abandoning their duties by delegating power to unelected bureaucrats and omnipotent congressional committees.[23] Lowi believed that the original delegations of power, as in the Interstate Commerce Commission, were well-conceived and structured so as to make agencies adhere to congressional intent. But, over time, delegation became less and less tied to specific mandates and more open-ended, allowing agencies an illegitimate amount of discretion. Legislators had abdicated responsibility for the execution of public policy, to be replaced by "interest group liberalism," meaning that agencies reacted to the wishes of those organized groups that pressured them for favorable policy decisions.[24] This, in turn, was wont to devolve into agency capture—public power exercised for the benefit of a few private interests against the public good, and unsupervised by democratically elected legislators. Similarly, iron triangles or subgovernments may form, in which congressional committees, interest groups and bureaucrats combine in an unholy trinity to deliver benefits to an interest group's members at the public's expense.

Until the late 1970s, most scholars agreed with this portrayal of Congress as less important in the ongoing control of agencies, relative to the courts and interest groups. Much of the support for this viewpoint came from the observation that Congress rarely exercised its most obvious levers of control, such as cutting agency budgets, revising original mandates, and rejecting presidential nominees.[25]

In the early 1980s, however, political scientists began to reassess the assumption that Congress has relatively little interest in

---

22 *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971), *reprinted in* GEORGE J. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION 114 (1975).

23 *See* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979).

24 *See id.*

25 *See* HAROLD SEIDMAN & ROBERT GILMOUR, POLITICS, POSITION AND POWER (4th ed. 1975); James B. Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 KAN. L. REV. 277 (1975). A commonly cited figure was the fact that the average Senate confirmation hearing lasted 17 minutes.

overseeing delegated authority. The battle lines were drawn clearly by Weingast and Moran, who distinguished the "bureaucratic" approach (agencies are not influenced by Congress) from the "congressional dominance" approach (Congress does exert significant influence).[26] Weingast and Moran made the important argument that the behavioral patterns emphasized by advocates of the bureaucratic approach—the scarcity of conspicuous oversight activities—were indeed consistent with a world not only in which Congress has little influence over bureaucrats, but also where Congress perfectly controls the bureaucracy. If the mere threat of congressional retaliation is enough to cower executive branch agents into submission, then these agents will never step out of line and legislators need never impose any overt sanctions. Thus, it is possible that the traditional tools of congressional control are so effective that they are never actually used. This is the problem of *observational equivalence.*

This theme of congressional oversight-at-a-distance was also the subject of an article by McCubbins and Schwartz, which examined the question of how a relatively uninformed Congress could possibly control bureaucrats much more knowledgeable about their particular policy area.[27] True, they could go out and gather their own information or force the agent to disclose information at oversight hearings ("police patrol" oversight), but this would quickly become prohibitively costly, consuming legislators' scarce time and energy. On the other hand, legislators have access to a cheap source of information, namely, those interest groups affected by the agency's decisions. These groups are generally well-informed about the relevant issue area and are more than willing to let their representatives know when an agency is acting contrary to their interests. Thus, legislators would be able to control agencies simply by sitting back and waiting to see if any groups come to their doors with complaints ("fire alarm" oversight). As in Weingast and Moran, if the fire alarm system works perfectly, then bureaucrats will never step out of line and no fire alarms will actually be sounded.[28]

In a similar vein, McCubbins, Noll, and Weingast[29] and

---

26 *See* Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 775-800 (1983).

27 *See* Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

28 *See* Weingast & Moran, *supra* note 26.

29 *See* Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Po-*

Kiewiet and McCubbins[30] point to administrative procedures as a key mechanism of congressional control. Along with establishing an agency and giving it an initial mandate, Congress also specifies the procedures that agencies must follow in reaching decisions. These procedures may influence bureaucrats to favor a certain constituency, avoid making rulings in a certain area, or otherwise bend them to legislators' will. Thus, congressional control is woven into the very fabric of the agency, exerting influence in a powerful, yet subtle, manner. Notice the similarities between this argument and those of the new institutionalist congressional scholars—one controls outcomes by controlling the procedures through which they are reached.

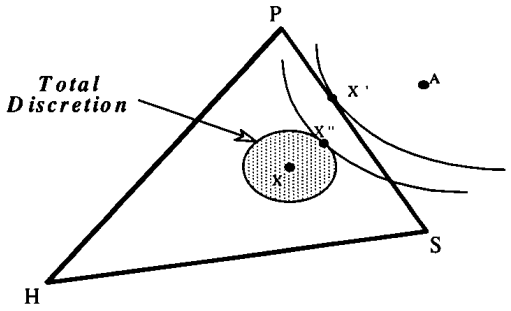
According to the administrative procedures literature, the basic problem that Congress faces when delegating authority is one of *bureaucratic drift*, or the ability of an agency to enact policies different from those preferred by the enacting coalition. This phenomenon, illustrated in Figure 1 below, occurs because agencies can make regulations that can only be overturned with the combined assent of the House, Senate, and the President. Let the ideal points of these three actors be H, S, and P, respectively, and assume that Congress passes and the President signs legislation designed to implement policy X. Then the Pareto set, or the set of outcomes for which no improvement for one actor is possible without disadvantaging any other actor, is the triangle joining the three ideal points. Now assume that the agency has policy preference A. The agency maximizes its utility by setting policy equal to X', the point in the Pareto set closest to its ideal point. Even though this policy is not what Congress and the President originally intended for it to be, the necessary coalition to overturn agency decisions cannot be formed.

---

litical Control, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McCubbins et al., *Administrative Procedures*]; Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McCubbins et al., *Structure and Process*].

30 *See* RODERICK D. KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATION PROCESS (1991).

Figure 1: Bureaucratic Drift and Agency Discretion



As detailed by Epstein and O'Halloran, two general categories of administrative devices have been identified as means of controlling bureaucratic drift.[31] The first category, *ex ante controls*, concerns issues of agency design. What are the procedures, including reporting and consultation requirements, that an agency must follow in making policy? Who are the agency's key constituents, and how will they influence decisionmaking? What standards or criteria must an agency consider when promulgating regulations? In which executive department will the new agency be located, and how far down the organizational ladder will political appointments reach? These are all threshold questions that legislators must answer when drafting the authorizing legislation.

The second category consists of *ongoing controls* by the institutions and procedures that regularly check agency actions. These institutions and procedures include instruments of congressional oversight, such as the direct and indirect monitoring discussed above, and renewing or withholding.[32] They also include judicial oversight implemented through existing administrative law[33] and presidential appointment powers.[34] Both ex ante and ongoing controls, then, serve to limit the degree to which agencies can act contrary to congressional intent.

---

31 *See* David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994).

32 *See generally* Randall L. Calvert et al., *Congressional Influence over Policy Making: The Case of the FTC*, *in* CONGRESS: STRUCTURE AND POLICY (Mathew McCubbins & Terry Sullivan eds., 1987).

33 *See generally* Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267 (1990) (special issue).

34 *See* Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588 (1989).

In addition, a more direct method of circumscribing agency influence is available. This method avoids the problems of costly monitoring and complicated administrative procedures, explicitly limiting the *discretion* of an agency to move outcomes from the status quo. Assume, as shown in Figure 1, that the relevant statute allows the agency to move policy only a limited distance away from X, e.g., by limiting agricultural price support levels to somewhere between sixty and ninety percent of parity. Outcomes are now equal to X'', which is much closer to Congress's original intent than X'. Whereas McCubbins, Noll, and Weingast define discretion as the actions that no political coalition can overturn and equate discretion with the limits of bureaucratic drift,[35] we argue that Congress may prefer to set *more stringent* limits on agency discretion than those implied by its ex post power to overturn agency decisions alone.

In fact, Congress limits executive branch discretion in this manner all the time, simply by passing specific, detailed legislation. If Congress had specified in the Occupational Safety and Health Act of 1970[36] that airborne concentrations of benzene emissions were to be limited to one part per million, then the Secretary of Labor would have little choice but to implement these standards. Any attempt to do otherwise would be overturned not by a coalition of the House, Senate, and President, but by the courts who, in turn, could not disregard Congress's explicit mandates without losing credibility. Thus, the discretion continuum connects congressional and executive policymaking; stating that there is no discretion is equivalent to saying Congress creates policy singlehandedly.

Congressional control over executive agencies, however, will always be imperfect. Although legislators may try to influence agency actions through administrative procedures, these controls can only ameliorate, but never completely resolve, the basic problem of trying to oversee better-informed executive actors. As Moe states:

> Experts have their own interests—in career, in autonomy—that may conflict with those of [legislators]. And, due largely to experts' specialized knowledge and the often intangible nature of their outputs, [Congress] cannot know exactly what its expert agents are doing or why. These are problems of conflict of interest and asymmetric information, and they are unavoidable.

---

35 *See* McCubbins et al., *supra* note 28.

36 Pub. L. No. 91-596, 84 Stat. 1590.

Because of them, control will be imperfect.[37]

The conclusion is that Congress does oversee agency actions, but it must still resolve the principal-agent problem of oversight and control by delegating the appropriate amount of authority to agencies in the appropriate way. Delegation that is too limited or tightly constrained will deny Congress the benefits of agency expertise and reduced workload that motivated the initial delegation of authority. On the other hand, by delegating too much power to an agency, Congress runs the risk of allowing policies to be enacted that are contrary to the wishes of legislators and their constituents. It is this trade-off between expertise and control informational gains and distributive losses that lies at the heart of this view of administrative procedures.

II. THEORY: THE POLITICAL LOGIC OF DELEGATION

We now juxtapose the legislative organization literature with the delegation literature to address our central questions of how much authority Congress delegates to the executive branch, and why Congress delegates more authority in some policy areas than in others.[38] The starting point for our analysis, as with all political analyses, is the equation that preferences are filtered through institutions to produce policy. That is, individuals and their preferences are the fundamental building blocks for political outcomes, but they do not, in and of themselves, predict a particular policy; one must also know the institutions that aggregate these preferences, as well as how they operate in a given circumstance. When predicting the outcome of a legislative election, for instance, one must not only know the partisan preferences of the electorate, but also the electoral system being used, e.g., proportional representation or plurality-winner elections, district-based or at-large, primaries or no primaries, and so on.

Here, we wish to explain delegation from the legislative to the executive branch and the impact of this delegation on public pol-

---

37 Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 271 (John E. Chubb & Paul E. Peterson eds., 1989).

38 Despite their obvious importance to the operation of our system of separate powers, these questions have received relatively little attention in the previous literature. Important exceptions include: MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1977); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982) (emphasizing the benefits of delegation when legislators wish to shift the blame for unpopular decisions); Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721 (1985) (positing that legislators delegate when they cannot reach an internal consensus on policy).

icy. The key actors in this situation are legislators, the President, and executive agencies. We assume the preferences of legislators and the President to be, first and foremost, reelection. They may have other concerns as well, such as the desire for power, rewarding friends, and good government, but to satisfy any of the above they must first retain public office. The preferences of bureaucrats are more difficult to specify, as they lack any direct electoral motivation. The bureaucracy literature suggests that they may be controlled by their political superiors, driven by the desire to expand their budgets, seek to protect their professional reputation, or angle for lucrative post-agency positions.[39] We will concentrate here on the former motivation—control by other political actors—as it is the most sensitive to variation in external political conditions.

We further assume that political actors who seek reelection will, on any given policy, attempt to bring final outcomes as close as possible to the median voter in their politically relevant constituency. Note that legislators will not necessarily take into account the preferences of all voters in their district if only a subset are mobilized on a particular issue, hence the possibility for special interest politics. On some issues, though, such as Social Security, minimum wage, and health care, a large proportion of the electorate will be mobilized, in which case the legislator will try to satisfy this broader constituency. Furthermore, we assume that actors' preferences over policy outcomes differ because they respond to different constituents. For instance, the fact that presidents have a national constituency usually means that they will be less susceptible to the demands of any one special interest, as opposed to House members who represent more narrowly defined geographical bases.

A. *Choosing How to Decide*

Our institutional analysis begins with the observation that there are two alternative modes for specifying the details of public policy. Policy can be made through the typical legislative process, in which a committee considers a bill and reports it to the floor of the chamber, and then a majority of the floor members must agree on a policy to enact. Alternatively, Congress can pass a law that delegates authority to regulatory agencies, allowing them to fill in some or all of the details of policy. The key is that, given a fixed amount of policy details to be specified, these two modes of poli-

---

[39] *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989).

cymaking are substitutes for each other. To the degree that one is used more, the other will perforce be used less.

Note also that it is Congress who chooses where policy is made. Legislators can either write detailed, exacting laws, in which case the executive branch will have little or no substantive input into policy, they can delegate the details to agencies, thereby giving the executive branch a substantial role in the policymaking process, or they can pick any point in between. Since legislators' primary goal is reelection, it follows that policy will be made so as to maximize legislators' reelection chances. Thus, delegation will follow the natural fault lines of legislators' political advantage.

In making this institutional choice, legislators face costs either way. Making explicit laws requires legislative time and energy that might be profitably spent on more electorally productive activities. After all, one of the reasons bureaucracies are created is for agencies to implement policies in areas where Congress has neither the time nor expertise to micro-manage policy decisions, and by restricting flexibility, Congress would be limiting agencies' ability to adjust to changing circumstances. This tradeoff is captured well by Terry Moe in his discussion of regulatory structure:

> The most direct way [to control agencies] is for today's authorities to specify, in excruciating detail, precisely what the agency is to do and how it is to do it, leaving as little as possible to the discretionary judgment of bureaucrats—and thus as little as possible for future authorities to exercise control over, short of passing new legislation. . . . Obviously, this is not a formula for creating effective organizations. In the interests of public protection, agencies are knowingly burdened with cumbersome, complicated, technically inappropriate structures that undermine their capacity to perform their jobs well.[40]

Where oversight and monitoring problems do not exist, legislators would readily delegate authority to the executive branch, taking advantage of agency expertise, conserving scarce resources of time, staff, and energy, and avoiding the logrolls, delays, and informational inefficiencies associated with the committee system.

Consider, for example, the issue of airline safety, which is characterized on the one hand by the need for technical expertise, and on the other hand by an almost complete absence of potential political benefits. That is, policymakers will receive little credit if airlines run well and no disasters occur, but they will have to with-

---

40 Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 228 (1990) (special issue).

stand intense scrutiny if something goes wrong.[41] Furthermore, legislative and executive preferences on this issue would tend to be almost perfectly aligned—have fewer accidents as long as the costs to airlines are not prohibitive. The set of individuals receiving benefits, the public who use the airlines, is diffused and ill organized, while those paying the costs of regulation, the airline companies, are well-organized and politically active. Furthermore, keeping in mind that deficiencies in the system are easily detectable, delegated power is relatively simple to monitor. For all these reasons, even if legislators had unlimited time and resources of their own (which they do not), delegation to the executive branch would be the preferred mode of policymaking.

However, delegation implies surrendering at least some control over policy, and legislators will be loathe to relinquish authority in politically sensitive policy areas where they cannot be assured that the executive branch will carry out their intent. To the extent that legislators delegate to the executive branch, they face principal-agent problems of oversight and control since agencies will be influenced by the President, by interest groups, by the courts, and by the bureaucrats themselves. If agencies are so influenced, they may abuse their discretionary authority and enact policies with which Congress is likely to disagree.

Take, by way of illustration, the issue of tax policy, where Congress uses considerable resources to write detailed legislation that leaves the executive branch with little or no leeway in interpretation.[42] The political advantages of controlling tax policy do not come from the duty of setting overall rates, which taxpayers tend to resent, but from the possibility of granting corporations and other well-organized lobby groups special tax breaks, so-called corporate welfare.[43] If designed correctly, these benefits can target a specific industry or group and are paid for by the general public, either through taxes paid into general revenues or by the decrease in revenue stemming from the tax break. Such political benefits are not lightly foregone, and they would be difficult to replicate through a delegation scheme with open-ended mandates. Thus,

---

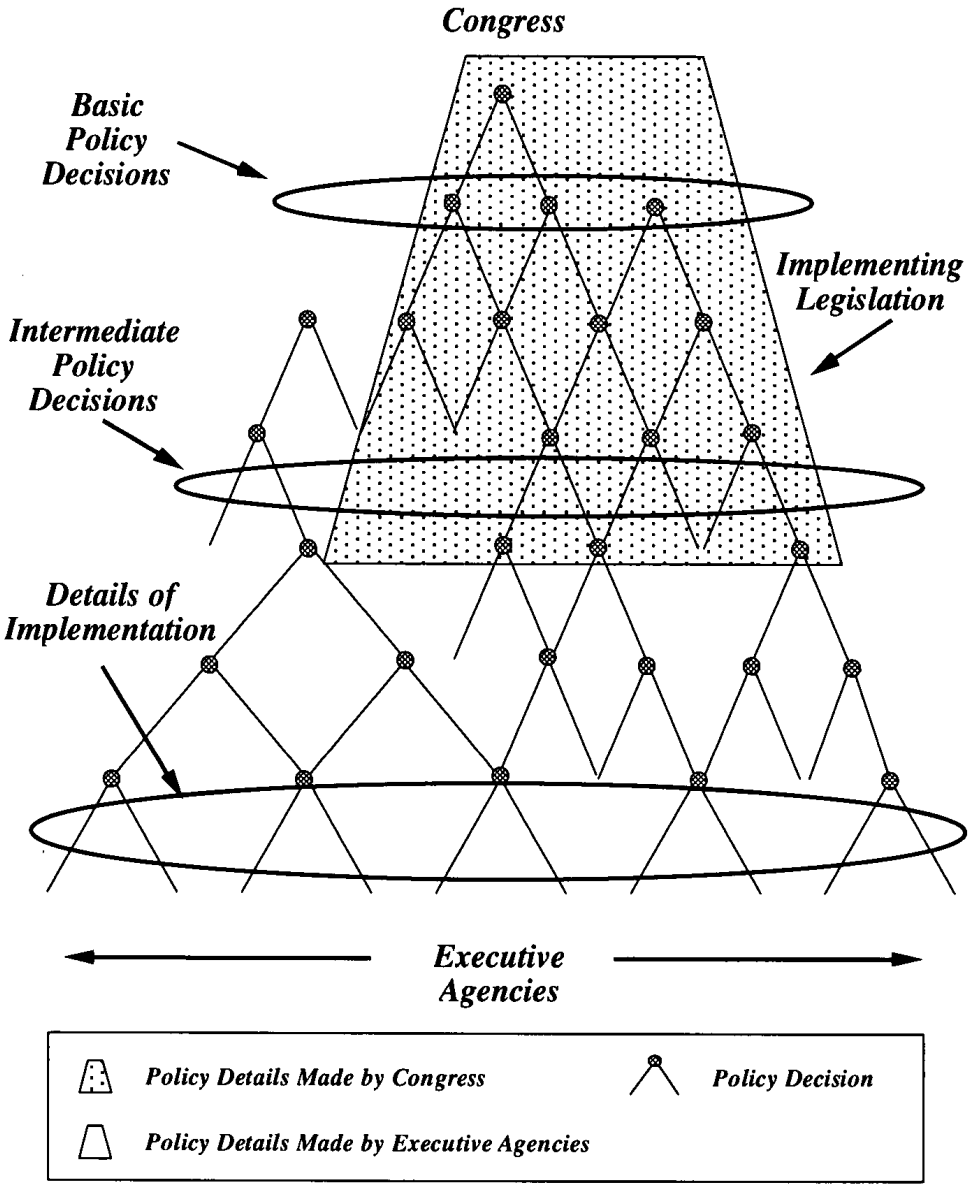
41 Airline regulation is an issue with only a political downside, and failures tend to be spectacular and well publicized.

42 The *Congressional Quarterly* summary of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, for instance, listed 136 major provisions, of which only three delegated substantive authority to the Executive.

43 For instance, one of the first items on which President Clinton used his line item veto, coming from the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788, would have provided a single individual, Texan multi-millionaire and major Republican party contributor, Mr. Harold Simmons, with a tax savings of $84 million over five years.

Congress continues to make tax policy itself, despite the demands of time and expertise that this entails.

Figure 2: Boundaries of the Administrative State



So, when deciding where policy will be made, legislators will trade off the internal costs of policymaking in committees against the external costs of delegating authority to regulatory agencies. We can think of Congress's decision of where to make policy as equivalent to a firm's make-or-buy decision—legislators can either produce policy internally, or they can subcontract it out (delegate) to the Executive. In making this decision, legislators face a continuum of possibilities: Congress can do everything itself by writing specific legislation and leave nothing to the Executive; it can give everything to the Executive by writing very general laws and do nothing itself; or it can choose any alternative in between. So, Congress will choose the point along this continuum—how much discretionary authority to delegate—that balances these two types of costs at the margin.

As a result, Congress delegates to the Executive in those areas which it handles least efficiently, where the committee system is most prone to over-logrolling and/or the under-provision of expertise. Conversely, it retains control over those areas where the political disadvantages of delegation—loss of control due to the principal-agent problem—outweigh the advantages. Just as companies subcontract out the jobs that they perform less efficiently than the market, legislators subcontract out the details of policy that they produce at a greater political cost than executive agencies.

B. *The Pyramid of Power*

To illustrate our argument, Figure 2 summarizes legislators' alternatives over the structure of policymaking. Each node of the tree represents a policy decision to be made in a given law, ranging from the most elemental decisions at the top (e.g., who will receive Social Security, and on what basis benefits will be paid) to the fine-grained details of implementation on the bottom (e.g., when and how to mail the benefit checks). The shaded area represents those details spelled out in the enacting legislation, so the boundaries between the shaded and unshaded regions are the boundaries of the administrative state in that policy area.

Note that the uppermost nodes fall within the sphere of legislative policymaking. This is where the nondelegation doctrine comes into play. Congress must make the basic policy decisions in any law; it cannot delegate without also specifying an "intelligible principle" for agencies to follow.[44] But, this standard imposes only

[44] These are Justice Taft's words from *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928).

a minimal constraint on Congress, which in practice is easily satisfied by reference to some reasonableness standard for bureaucrats.[45] At the bottom of the diagram, Congress will usually not find it useful or even possible to specify the most intricate details of policy implementation. Consequently, the scope of detail in a given piece of legislation will be limited, making explicit some policy choices and leaving others to executive actors. And the boundaries between legislative and executive action will be adjusted over time as one mode of policy production or the other better fulfills legislators' reelection needs.

C. *Empirical Predictions*

If this theory aptly describes legislators' preferences over delegation, then what patterns should we expect to see in executive discretion from law to law? To begin with, legislators should be more willing to delegate authority to executive branch actors who share their preferences than to those who do not, as such actors are less likely to use their discretion in the pursuit of policy goals contrary to legislators' desires. To the extent that partisan affiliation can serve as a proxy for preferences, and to the extent that the President can control agency actions through appointment powers, we should expect to see Congress delegate more authority to Presidents of their own party than to Presidents of the opposite party.

In a similar vein, legislators should be more apt to rely on committees whose membership mirrors that of the floor, and to distrust outlying committees. The legislative organization literature reviewed above emphasizes that committees whose preferences differ from those of the floor will not receive procedural benefits such as closed rules and deference in the policymaking process. If our theory is correct, then these should also be the committees that lose authority to their executive branch counterparts.

A third prediction arising from our approach concerns the informational as opposed to distributive nature of policymaking. As policy becomes more complex, Congress will rationally rely more

---

[45] In fact, only two New Deal-era cases have nullified legislation for lack of compliance with the nondelegation doctrine. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). Both cases invalidated key provisions of the National Industrial Recovery Act ("NIRA") as over-broad delegations of authority, not only to executive branch officials but also to private industry boards as well, which were to be allowed to set their own rules of conduct. NIRA was actually an extraordinarily ambitious act, and it would probably be struck down today as well.

on the executive branch to fill in policy details. This occurs for two reasons. The first and most obvious reason is that the executive branch is filled (or can be filled) with policy experts who can run tests and experiments, gather data, and otherwise determine the wisest course of policy, much more so than can 535 members of Congress and their staff.[46] The second, less obvious reason has to do with the fact that expertise garnered in legislative committees cannot be transformed directly into policy outcomes. Rather, it must first pass through the floor, which may decide to make some alterations to the committee's proposals. The existence of the floor as a policy middle-man gives committees less incentive to gather information in the first place. Executive agencies, on the other hand, are not hampered by the need to obtain congressional approval; their rulings become law directly. Therefore, even purely policy-motivated executive agencies will be more informationally efficient than will be congressional committees.

Bringing together these statements, we predict that Congress would delegate more authority to the Executive:

1. The closer are the preferences of the Executive to the median floor voter, so that divided government leads to less discretion;

2. The higher the level of conflict between the committee and the median floor voter, so that committee outliers lead Congress to delegate less authority; and

3. The more complex is a policy area.

Note that our theory, if correct, contradicts the key predictions of the nondelegation forces. Rather than portraying Congress as delegating ever-increasing authority to executive actors, we assert that levels of delegation will rise and fall over time in response to changing external factors. Instead of assuming that legislators have no interest in monitoring delegated authority, we assert that they will empower interest groups, the courts, and other actors to challenge agency actions through administrative procedures as well as direct oversight. Finally, a revitalized nondelegation doctrine would have the effect of shifting back to Congress precisely those policy areas, such as the reduction of pork barrel benefits, that it handles poorly relative to the Executive, so limits on delegation would only tend to diminish the efficacy of the political process.

---

[46] True, more staff can always be hired, but this creates ever more intense problems of supervising and monitoring the staff's activities.

III. TEST: PATTERNS OF DELEGATION IN THE POSTWAR ERA

We now turn to the question of whether or not our predictions are borne out in practice as well as theory. We use a sample of laws based on David Mayhew's list of important legislation in the postwar era contained in his book, *Divided We Govern*.[47] Mayhew's purpose in compiling this list was different than our current enterprise—he sought to show that the number of important pieces of legislation enacted during times of divided partisan control of government does not differ markedly from those enacted under unified government. For our present purposes, what counts is that Mayhew devised a methodology for identifying important pieces of legislation, which will serve as our sample of laws to be analyzed.

Mayhew's data set includes 267 enactments over the 1947 to 1990 period. Starting from this number, we added the important laws passed in the 102d Congress, then eliminated the entries that were either treaties or constitutional amendments and those laws that had insufficient legislative summaries in the *Congressional Quarterly*, bringing the final number to 257 public laws in our data set.

A. *Measuring Executive Discretion*

We measure the total amount of discretion ceded to the Executive in law i as the amount of authority delegated (r_i) less the total constraints (c_i) placed on the executive's use of that discretionary authority: $d_i = r_i - c_i$.[48] Here, the delegation ratio (r_i) is defined as the number of major provisions listed in the *Congressional Quarterly* summary of each law that delegated discretionary authority to the executive branch, over the total number of provisions:

---

47 DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-1990 (1991) (defining important legislation in a two-step—or as he calls it, a "two-sweep"—process). The first sweep of legislation includes those bills reported in the year-end roundups of both *The New York Times* and *Washington Post*. This sweep captures contemporary judgments about the productivity of national government and identifies those pieces of legislation that were thought to be of historic significance. The second sweep captures those laws which historians and political observers, in hindsight, identify as being of lasting importance. This second sweep covered laws only through the early 1980s, as laws passed more recently would not yet be covered in the secondary sources that Mayhew relied on for posterior judgment).

48 For a more complete description of this process, see DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS (1999).

$$r_i = \frac{\textit{Provisions with Executive Delegation}}{\textit{Total Provisions}}$$

Thus, bills in which every provision delegated authority to the Executive would receive a delegation ratio of one, and laws in which no provision delegated authority would receive a ratio of zero. Summary statistics for the delegation ratio and the other measures in our analysis are provided in Table 1.

Table 1: Summary Statistics

Variable	Mean	Std. Dev.	Min	Max
Delegation Measures				
Major Provisions	44.96	66.56	1	674
Executive Delegations	11.51	17.51	0	187
Constraint Measures				
Appointment Limits	0.32	0.46	0	1
Time Limits	0.50	0.50	0	1
Spending Limits	0.50	0.50	0	1
Legislative Action	0.12	0.33	0	1
Executive Action	0.11	0.32	0	1
Legislative Veto	0.13	0.34	0	1
Reporting Requirements	0.55	0.50	0	1
Consultation Requirements	0.29	0.45	0	1
Public Hearings	0.12	0.33	0	1
Appeals Procedures	0.26	0.44	0	1
Rulemaking Requirements	0.79	0.41	0	1
Exemptions	0.46	0.50	0	1
Compensations	0.16	0.37	0	1
Direct Oversight	0.07	0.26	0	1

Table 1: Summary Statistics (continued)

Variable	Mean	Std. Dev.	Min	Max
Calculated Variables				
Delegation Ratio (r_i)	28.42%	20.62%	0	100%
Constraint Ratio (c_i)	31.03%	18.80%	0	85%
Total Discretion (d_i)	**18.31%**	**16.09%**	**0**	**100%**
Control Variables				
Divided	0.61	0.49	0	1
Seat Share	-0.009	0.092	-0.17	0.15
Committee Outlier	0.06	0.06	0	0.42
Total Hearings	75.15	24.10	2.66	125.25
Oversight Hearings	5.30	2.40	0.08	12.5
Fragmentation	13.26	4.79	0	20

The second component of the discretion index is the administrative procedures, the hoops and hurdles, that Congress attaches to the Executive's exercise of delegated authority. After canvassing the congressional oversight literature and reading through the legislation in our data set, we settled on a list of fourteen procedural constraints that might appear in any law.[49] These categories, along with their descriptions, are listed in Table 2.

[49] In our survey we relied in particular on the works by: JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990); RONALD CASS & COLIN DIVER, ADMINISTRATIVE LAW: CASES AND MATERIALS (1987); SHARYN O'HALLORAN, POLITICS, PROCESS, AND AMERICAN TRADE POLICY (1994); WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (3d ed. 1989); PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES (1989); McCubbins et al., *Administrative Procedures*, *supra* note 29; McCubbins et al., *Structure and Process*, *supra* note 29; Stewart, *supra* note 6.

Table 2: Categories of Constraints

CATEGORY	DESCRIPTION
APPOINTMENT POWER LIMITS	Are there any constraints on executive appointment powers that go beyond the advice and consent of the Senate?
TIME LIMITS	Are there sunset limits on delegation? That is, does any delegated authority expire after a certain fixed time period?
SPENDING LIMITS	Does the act define a maximum amount that the agency can allocate to any activity or set of activities, either stated explicitly or in a formula?
LEGISLATIVE ACTION REQUIRED	Do agency determinations require the action (approval) of Congress to take effect?
EXECUTIVE ACTION REQUIRED	Do agency determinations require the action (approval) of another agency or the President to take effect?
LEGISLATIVE VETO	Does Congress retain a unilateral ex post veto over the enactment of an agency regulation?
REPORTING REQUIREMENTS	Are any specific reporting requirements imposed on agency rulemaking?
CONSULTATION REQUIREMENTS	Are consultations with any other actor, either public or private, required prior to final agency actions?
PUBLIC HEARINGS	Are public hearings explicitly required?
APPEALS PROCEDURES	Is there a procedure stated in the act for a party adversely affected by agency actions to appeal the agency's decision?
RULEMAKING REQUIREMENTS	Do explicit mandates require rulemaking or adjudicatory processes to be carried out in a certain manner (beyond the requirements of the Administrative Procedure Act)?
DIRECT OVERSIGHT	Is there a procedure defined in the implementing legislation by which a non-agency actor reviews the agency's activities—i.e., a General Accounting Office audit of the agency?
EXEMPTIONS	Is any particular group, product, or affected interest exempt from any aspect of regulation for a given period of time?
COMPENSATIONS	Are any groups, industries, or states given a specific compensation? In particular, does the act mention any group as receiving either additional time to adjust to the new regulations, or some concession because of the costs that may be imposed?

Using the *Congressional Quarterly* summaries, we coded each law for the incidence of these constraints. Descriptive statistics for all categories are shown in Table 1, with the means of each category indicating the percent of bills that contain at least one instance of that type of administrative procedure.[50] The constraint index was then calculated as the number of constraints observed in a law over the total possible number of constraints, scaled by the delegation ratio:

$$c_i = \frac{Categories\ of\ Constraints\ in\ a\ Law}{Total\ Categories} * r_i.$$

Total discretion is then simply calculated as the difference between the delegation and constraint ratios. Defining discretion in this way accomplishes three goals: 1) it avoids negative values of discretion; 2) it translates delegation and constraints into common units that can then be compared; and 3) it provides a continuous measure of discretion that falls between zero and one.

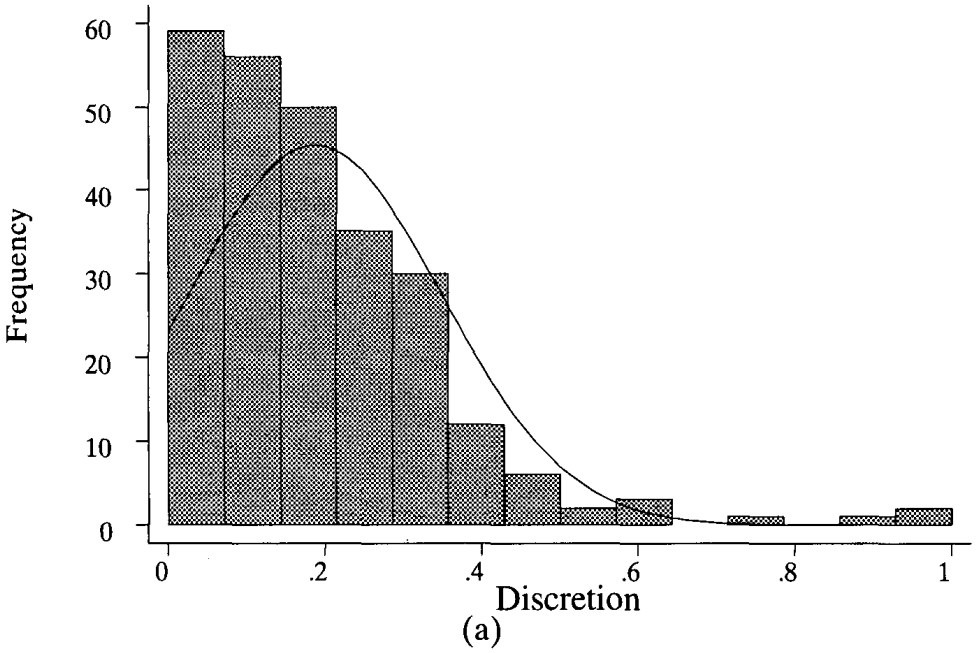
A histogram of the discretion index for the laws in our sample is provided in Figure 3, with normal distributions overlaid. Nondelegation advocates would predict high values of r_i and low values of c_i. That is, high levels of delegation with few constraints, so that overall executive discretion is high. Note, however, that the distribution in Figure 3 is skewed towards lower values of discretion. In fact, the average value is only 18% on a zero to one scale. This skew is corrected somewhat when the zero-delegation laws are removed from the figure, making the distribution track a normal curve more closely, but there are still only nine laws with discretion indexes above 0.5, as opposed to twenty-five that delegated no authority.[51] In short, Figure 3 does not portray a situation in which Congress delegates large swaths of discretionary authority to executive actors; those delegations that do exist appear to be moderate and circumscribed by the imposition of restrictive administrative procedures.

---

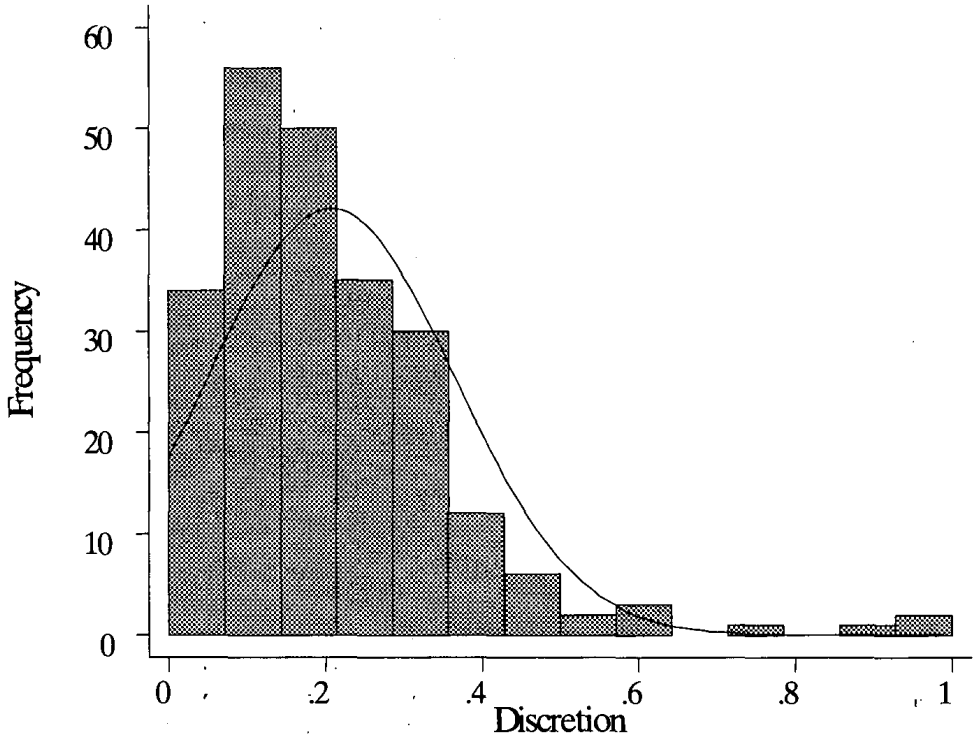
50 For instance, rulemaking requirements appeared in nearly 80% of the laws in our sample, reporting requirements and spending limits appeared in about half, and legislative action, executive action, and a legislative veto were included in just above 10%.

51 Nor is this result simply an artifact of Congress's delegating large amounts of authority and then adding administrative procedures to constrain executive actors. In our data set of 257 laws, only 31 had delegation ratios of 0.5 or greater, or less than one-eighth of the sample.

Figure 3: Histogram of Discretion Index, with and without Zero-Delegation Laws



(a)



(b)

B. *Patterns and Postwar Trends*

As a first check on the plausibility of our measure of discretion, we identified those bills that contain no executive delegations, the bills for which d_i=0. Table 3 provides the year, Congress, public law number, and title for the twenty-five bills that met this criterion. The table reveals some noteworthy results. Some entries, such as the Consumer Goods Pricing Act of 1975[52] and the Birthday of Martin Luther King, Jr.,[53] had only one major provision with no delegation: the former prohibited state laws allowing manufacture-dealer price fixing, while the latter established a national holiday. Some laws were instances of rare legislation that do not involve executive authority, such as the granting of Alaskan statehood, the Public Health Cigarette Smoking Act of 1969[54] (banning cigarette advertising on television), the Civil Rights Restoration Act of 1987[55] (which overruled the 1984 Supreme Court ruling in *Grove City College v. Bell*[56]), and the granting of reparations to Japanese-Americans who were relocated during World War II.[57]

52 Pub. L. No. 94-145, 89 Stat. 801.
53 Pub. L. No. 98-144, 97 Stat. 917 (1983).
54 Pub. L. No. 91-222, 84 Stat. 87 (1970).
55 Pub. L. No. 100-259, 102 Stat. 28.
56 465 U.S. 555 (1984).
57 *See* Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903.

Table 3: Acts with No Executive Discretion

Year	Congress	PL Num.	Title
1948	80	80-471	Revenue Act of 1948
1950	81	81-734	Social Security Act Amendments of 1950
1950	81	81-814	Revenue Act of 1950
1950	81	81-909	Excess Profits Tax Act of 1950
1952	82	82-590	Social Security Increase of 1952
1953	83	83-31	Submerged Lands Act
1954	83	83-591	Internal Revenue Code of 1954
1954	83	83-761	Social Security Amendments of 1954
1955	84	84-381	Minimum Wage Increase of 1955
1958	85	85-508	Alaska Admission into Union
1961	87	87-30	Fair Labor Standards Amendment of 1961
1963	88	88-38	Equal Pay Act of 1963
1965	89	89-44	Excise Tax Reduction Act of 1965
1968	90	90-364	Revenue and Expenditure Control Act of 1968
1970	91	91-222	Public Health Cigarette Smoking Act of 1969
1972	92	92-336	Public Debt Limitation—Extension
1972	92	92-512	State and Local Fiscal Assistance Act of 1972
1973	93	93-233	Social Security Benefits—Increase
1975	94	94-12	Tax Reduction Act of 1975
1975	94	94-145	Consumer Goods Pricing Act of 1975
1981	97	97-34	Economic Recovery Tax Act of 1981
1983	98	98-144	Public Holiday—Birthday of Martin Luther King, Jr.
1988	100	100-259	The Civil Rights Restoration Act of 1987
1988	100	100-383	Wartime Relocation of Civilians
1989	101	101-157	Fair Labor Standards Amendments of 1989

Other bills, though, were more substantive and contained a fair number of provisions, including the Internal Revenue Code of 1954,[58] the Tax Reduction Act of 1975,[59] and the Economic Recovery Tax Act of 1981,[60] with seventy-one, forty, and eighty major provisions, respectively. These bills pertain to tax and fiscal policy, areas in which Congress has traditionally been reluctant to cede power to the Executive. A similar story holds for the social security increases, changes in minimum wage, and other money bills on the list. These are all areas where the usual mode is for Congress to write specific, detailed legislation that leaves the Executive with little room for interpretation when enacting the law.

Table 4 shows the acts with the highest levels of executive discretion. These laws are obviously quite different in nature from those above. High-delegation laws tend to concern issues of defense and foreign policy (the National Aeronautics and Space Act of 1958[61] and the Selective Service Amendments Act of 1969[62]), environmental policy (the Air Quality Act of 1967,[63] the Water Quality Improvement Act of 1970,[64] and the Clear Air Act Amendments of 1966[65]), and health and general social policy (the Maternal and Child Health and Mental Retardation Act of 1963,[66] the Health Research Facilities Amendments of 1965,[67] and the Stewart B. McKinney Homeless Assistance Act of 1987[68]). Traditionally, Congress has willingly ceded the Executive great leeway in these areas, as the results of ill-formed policy are often drastic and the political advantages of well-formulated laws are not nearly as evident—they have only a political downside.

58 Pub. L. No. 83-591, 68A Stat. 3.
59 Pub. L. No. 94-12, 89 Stat. 26.
60 Pub. L. No. 97-34, 95 Stat. 172.
61 Pub. L. No. 85-568, 72 Stat. 426.
62 Pub. L. No. 91-124, 83 Stat. 220.
63 Pub. L. No. 90-148, 81 Stat. 485.
64 Pub. L. No. 91-224, 84 Stat. 91.
65 Pub. L. No. 89-675, 80 Stat. 954.
66 Pub. L. No. 88-156, 77 Stat. 273.
67 Pub. L. No. 89-115, 79 Stat. 448.
68 Pub. L. No. 100-77, 101 Stat. 482.

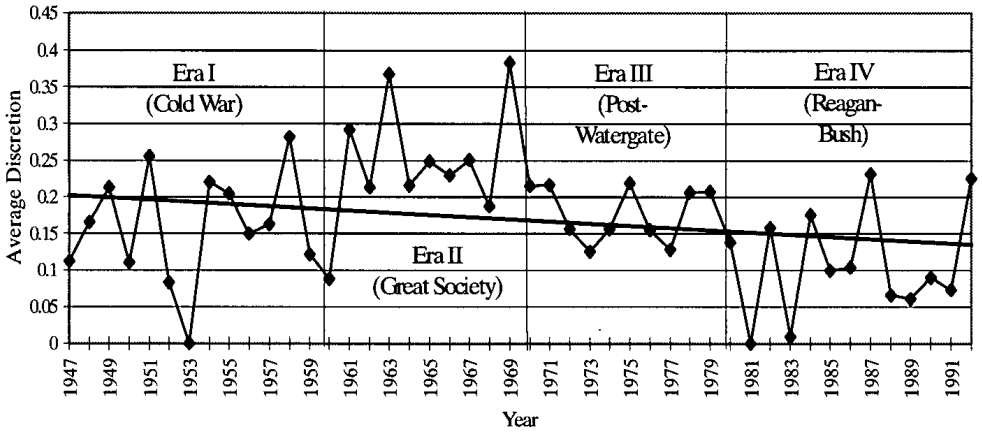
Table 4: Acts with Most Executive Discretion

Year	Congress	PL Num.	Title	Discretion
1978	95	95-619	National Energy Conservation Policy Act	0.48
1967	90	90-148	Air Quality Act of 1967	0.49
1970	91	91-224	Water and Environmental Quality Improvement Act of 1970	0.50
1958	85	85-568	National Aeronautics and Space Act of 1958	0.51
1987	100	100-77	McKinney Homeless Assistance Act of 1987	0.53
1966	89	89-675	Clean Air Act Amendments of 1966	0.57
1958	85	85-864	National Defense Education Act of 1958	0.64
1963	88	88-156	Maternal and Child Health and Mental Retardation Planning Amendments of 1963	0.64
1963	88	88-164	Mental Retardation Facilities and Community Health Centers Construction Act of 1963	0.79
1965	89	89-115	Health Research Facilities Amendments of 1965	0.93
1961	87	87-41	Inter-American Program—Appropriation	1.00
1969	91	91-124	Selective Service Amendments Act of 1969	1.00

These results give some support to our contention that legislators systematically vary the degree of executive branch discretion from one issue area to the next, in line with their desires for reelection. In those policy areas with the greatest potential political benefits, Congress makes specific, detailed policy, and it delegates in those areas where executive policymaking is more advantageous. On the other hand, if Congress delegated solely as a means to avoid difficult choices, as the advocates of nondelegation argue, then we would not expect legislators to enact direct laws in such contentious policy areas as taxation, social security, and minimum wage.

It is also enlightening to examine trends in executive discretion over the postwar period. Figure 4 displays a graph of average discretion, year by year, for our data, with a trend line overlaid. The graph shows considerable amounts of variation over time—higher rates of delegation during the Great Society Era of the 1960s and lower rates during the gridlocked 1980s—with an overall downward trend. Given these patterns, it is not hard to understand intellectual trends in the politics of delegation. Viewing the situation in the late 1960s, it is natural that some observers, such as Lowi,[69] would fear an ever-expanding rate of delegation with relatively little congressional control. Those writing in the late 1970s, such as Fiorina,[70] would be less worried about this trend, as the Nixon, Ford, and Carter administrations saw a lessening of delegated authority, and by the late 1980s, scholars like McCubbins, Noll, and Weingast would be more apt to speak of carefully delimited delegation.[71] Fears that Congress will abdicate its constitutional role by delegating increasing amounts of authority to the Executive would therefore seem to be misplaced, at least from our current vantage point. To put it another way, the only way for these findings to be consistent with the arguments of nondelegation proponents would be in the unlikely circumstance that policy choices have become significantly less difficult over time, rather than more difficult, so that Congress prefers to delegate less now than before.

Figure 4: Average Discretion, by Year



69 *See* LOWI, *supra* note 23.

70 *See* FIORINA, *supra* note 38.

71 *See generally* McCubbins et al., *Administrative Procedures*, *supra* note 29; McCub-

Furthermore, decomposing this trend reveals that average rates of delegation to the Executive have remained fairly constant on average over the postwar era, while the constraints on delegated authority have risen. From the legislators' perspective, these findings make a good deal of sense since, as government activity widens in scope and becomes more complex, a fixed number of legislators will have a harder time overseeing executive branch activities. They will, therefore, enlist outside interest groups, the courts, and other executive actors as allies in the task of congressional oversight. Once again, delegation to executive officials is not monolithic. Rather, it varies over time as legislators readjust the division of policymaking authority between the branches in response to changing conditions.

C. *Predicting Discretion*

As outlined above, our theory makes explicit predictions concerning the effect of divided government, committee outliers, and issue area characteristics on delegation. We now proceed to test this theory for the laws included in our data set—our 257 pieces of major postwar legislation. Our approach will rely on multiple regression analysis, using the discretion measure derived above as the dependent variable and proxies for interbranch conflict, committee-floor tension, and the informational content of issue areas as independent variables.

To measure the former, we start with *divided* government, which is coded zero if both chambers of Congress and the presidency are controlled by the same party, and one otherwise. The *seat share* measure is a more sensitive indicator of divided government, defined as the average percent of seats held in the House and the Senate by the party opposite the President. For example, when the President's party holds 45% of the seats in both chambers and the opposition 55%, seat share equals 10%. Descriptive statistics of these and other variables in the regressions are also provided in Table 1 above. The prediction is that, as the percent of seats held by the opposite party increases, Congress grants less discretionary authority to the Executive.

Figure 5 provides a quick summary of these partisan conflict data, showing the bivariate relation between seat share and discretion, with one data point for each Congress, unified government in bold, and divided government in italics. Notable congressional overachievers in terms of discretion include President Nixon's first

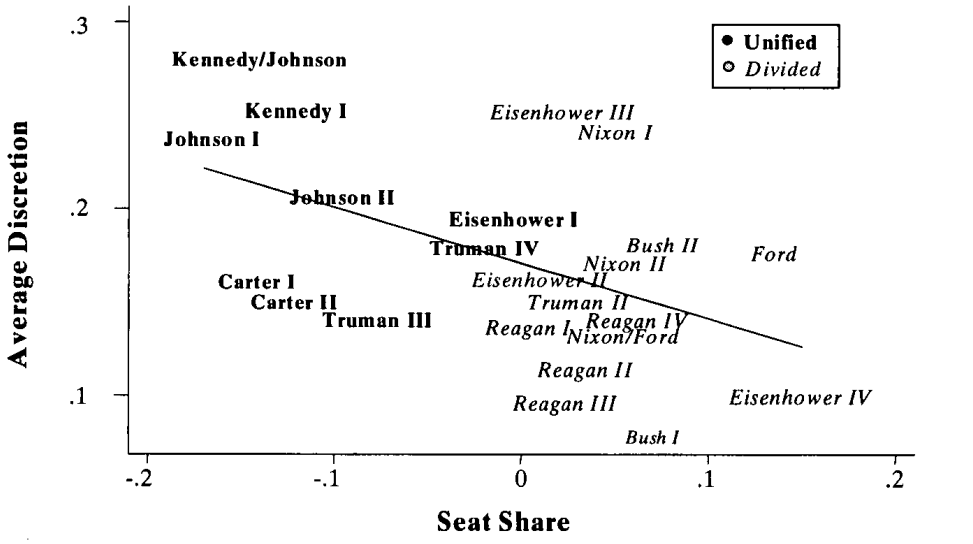
---

bins et al., *Structure and Process*, *supra* note 29.

term,[72] the Kennedy/Johnson Congress,[73] and the start of President Eisenhower's second term.[74] Underachievers include one Congress each for Reagan and Bush[75] and Carter's entire tenure.[76] As shown clearly in the graph, higher levels of partisan conflict are associated on average with less delegation to executive actors, thus confirming our first prediction.

We next measured the degree to which each committee was a preference outlier with respect to the floor. As of the 102d Con-

Figure 5: Discretion vs. Seat Share, by Congress



gress,[77] twenty-two standing committees composed the legislative machinery of the House of Representatives.[78] Relying on the Garrison Nelson data set, we constructed a list of all committee assignments from the 80th to 102d Congresses.[79] We then combined

---

72 91st Congress (1969-1971).

73 88th Congress (1963-1964).

74 85th Congress (1957-1958).

75 99th Congress (1985-1986) and 101st Congress (1989-1990), respectively.

76 95th Congress (1977-1978) and 96th Congress (1979-1980), respectively.

77 1991-1992.

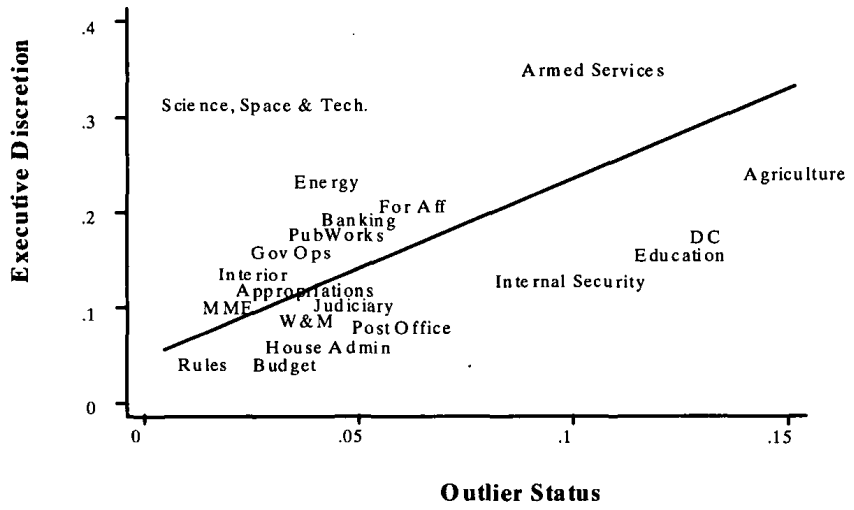
78 Committees that changed name during this period were identified by their name as of the 102d Congress. Only one committee was abolished completely, the Internal Security Committee, which from the 80th to 90th Congresses was entitled the Committee on Un-American Activities.

79 These data were compiled while the authors were participants of the Harvard-MIT Research Training Group. We thank Charles Stewart for his assistance. All data were

these rosters with Poole and Rosenthal Nominate scores, which order members along a general liberal-conservative continuum, to calculate the median committee preferences, as well as median party contingent preferences by committee and by Congress.[80] From this data we constructed the *committee outlier* variable, defined as the median majority party Nominate score on the committee that reported a given bill, less the median Nominate score for the party overall.

A graph of committee outliers and discretion shows, like the previous figure, a strong pattern supporting our predictions. As the committees considering a bill became more of an outlier, Congress delegated more authority to the executive branch. One interesting data point in Figure 6 is the Agriculture Committee, long noted as representing farm interests much more heavily than the average member of Congress. The data suggest that the committee appears as a preference outlier, but it also shows that considerable amounts of authority have been delegated to executive

Figure 6: Committee Outliers and Executive Discretion



branch actors in this policy area, thereby curbing to some extent the committee's logrolling tendencies.

---

checked against the relevant volumes of the *Congressional Directory*; committee rosters used were those as of the beginning of each Congress.

80 For a complete discussion of Nominate scores, which range from: -1 (liberal), to 1 (conservative), see KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL-CALL VOTING (1997).

Finally, we measured the informational content of an issue area, traditionally a difficult task. We have therefore developed our own measures of issue area complexity based on committee hearings data available in the Congressional Information Service's *Congressional Masterfile*.[81] This source lists all congressional hearings by committee, with a subject description of the hearing, witnesses, and dates held. Our measure is based on the assumption that committees dealing with more informationally intense issue areas will be the ones that hold the greatest number of hearings. In fact, many authors have described the key role of hearings in gathering both technical and political information relating to the measure at hand. For example, Polsby states:

> All [these hearings] are necessary—to make a record, to demonstrate good faith to leaders and members of the House and Senate, to provide a background of demonstrated need for the bill, to show how experts anticipate that the bill's provisions will operate, to allay fears, and to gather support from the wavering. Not only does it tell congressmen what the technical arguments for and against a bill are, but, even more important, it tells them *who*, which interests and which groups, are for and against bills and how strongly they feel about them.[82]

The same can be said of oversight hearings in particular, which Aberbach identified as a key element of committees' "intelligence systems."[83] Committees that hold more oversight hearings, in general, invest greater resources to monitor details of policy implementation. This yields two ways to measure the informational component or complexity of legislation: by the average number of *hearings*, and by the percent of *oversight* hearings of the committee or committees that reported the legislation.

A first look at these data is provided in Figure 7, which graphs the average number of hearings per Congress and the average level of executive discretion, by committee. As shown, the trend is indeed generally positive. Armed Services has relatively high discretion given the number of hearings held, and Appropriations relatively low discretion. Otherwise, though, this simple predictor does a fairly good job of estimating the amount of discretion in laws reported by the committees.

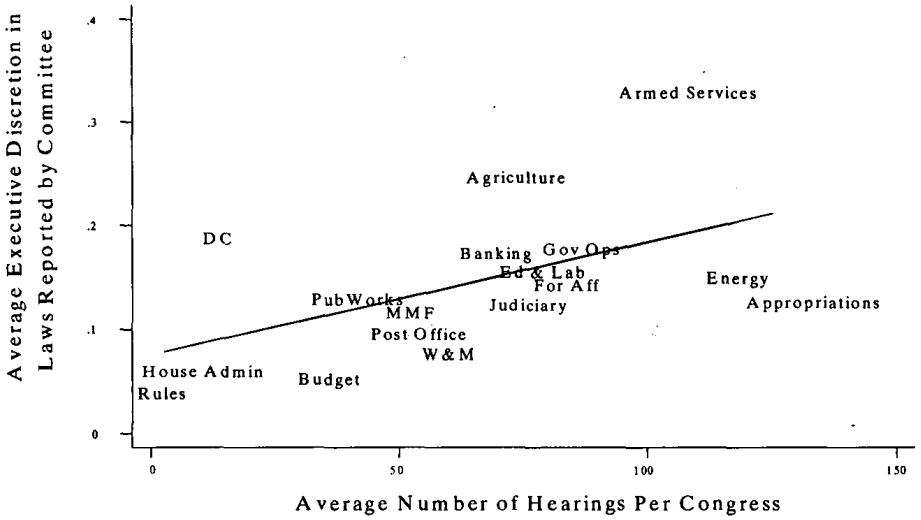
---

81 © 1997 Congressional Information Service, Inc. Used by permission.

82 NELSON W. POLSBY, CONGRESS AND THE PRESIDENCY (4th ed. 1986).

83 *See* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990).

Figure 7: Discretion and Number of Hearings, by Committee



As a check on these measures, we also employ another proxy for informational intensity: committee scope, as defined by Smith and Deering's fragmentation of a committee's jurisdiction.[84] The broader the scope of issues that come under a committee's aegis, the more expertise will be required to manage them. Our *fragmentation* variable is constructed as a combination of the number of departments and agencies under each committee's jurisdiction, and the number of areas of legislative jurisdiction in the chamber rules.[85] Since those committees with more fragmented jurisdictions would be expected to hold more hearings, and especially more oversight hearings, this serves as a useful check on our other measures. Indeed, the scope measure correlates with the number of hearings at 0.63 and with oversight hearings at 0.59. Also, this measure ranks the committees in roughly the same order as the hearings-based measures.

We are now in a position to present our results. Regressing the amount of discretion given to the executive branch, law by law, on congressional-executive conflict, committee outlier status, and informational intensity, Table 5 suggests that in all cases our major variables were significant in predicting the level of discretionary authority delegated to the Executive. More congressional-Executive conflict leads to less discretionary authority; a 4% decrease in discretion on average. The committee measure indicates

84 *See* STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS (2d ed. 1990).

85 *See id.* at 80.

that outlying committees induce the floor to delegate more authority to the Executive. Finally, the table shows that as issue areas become more informationally intense, no matter how information is measured, more authority is delegated as well.

Table 5: Regression Analysis

Dependent Variable: Executive Discretion

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
			Inter-Branch Conflict			
Divided	-0.04 (-2.90)**	-0.04 (-3.12)**	-0.04 (-3.10)**			
Seat Share				-0.17 (-2.50)**	-0.18 (-2.59)**	-0.18 (-2.66)**
			Legislative Organization			
Committee Outlier	0.38 (3.68)**	0.27 (2.60)**	0.34 (3.37)**	0.39 (3.77)**	0.29 (2.77)**	0.36 (3.50)**
			Issue Area Characteristics			
Avg. Hearings	0.001 (4.89)**			0.001 (4.92)**		
Avg. Oversight Hearings		0.01 (4.07)**			0.01 (3.99)**	
Scope of Jurisdiction			0.01 (5.02)**			0.01 (5.00)**
Constant	0.05 (2.16)**	0.10 (5.39)**	0.06 (2.97)**	0.02 (1.12)	0.07 (4.37)**	0.04 (1.82)*
F_{n-k}^{k}	16.42**	13.93**	17.41**	15.65**	13.13**	16.68**

Note: t-statistics in parentheses, calculated from robust standard errors; one-tailed test *< 0.10; **< 0.05. N=292. The data includes multiple referrals. High leverage outliers with Cook's distances greater than 0.04 omitted from the sample.

Furthermore, analysis of standardized coefficients shows that each of these three factors had roughly similar effects on delega-

tion, so no one dimension dominates Congress's decision to delegate. These results confirm our hypothesis that a political logic underlies the process of delegation. Executive discretion increases when it better suits legislators' need for reelection, and it decreases when legislative policymaking becomes politically more efficient. Combined with the finding that in major legislation the norm is for Congress not to delegate large amounts of its authority (recall that the mean of the discretion variable was only 0.18), our findings imply a measured view of delegation. It certainly exists, but it does not overwhelm congressional policymaking, and, if anything, the trend over time shows it to be decreasing rather than increasing.

CONCLUSION

Arguments in favor of strengthening the nondelegation doctrine rest on the assumption that congressional policymaking is centered around the provision of particularized benefits to favored constituents, leaving legislators too little time to consider important pieces of public policy. A stronger interpretation of the nondelegation doctrine would, therefore, force Congress to take up major issues that it had been leaving to the executive branch, thus restoring accountability to public policy and curbing a runaway bureaucracy.

This Article provides three responses to this requirement. First, our data show that Congress does not delegate wholesale to the Executive. Even on important policy issues, some of which, like the budget and tax policy, require considerable time and expertise, Congress takes a major role in specifying the details of policy. Second, when Congress does delegate, it also constrains executive discretion with restrictive administrative procedures. In fact, legislators carefully adjust and readjust discretion over time and across issue areas so as to balance the marginal costs and benefits of legislative action against those of delegation. Congress is not free from particularistic legislation, but neither does it devote its energies solely to narrow, individually tailored policy at the expense of larger issues.

Third, delegation is not only a convenient means to allocate work across the branches, but it is also a necessary counterbalance to the concentration of power in the hands of committees. In an era where public policy becomes ever more complex, the only way for Congress to make all important policy decisions internally would be to concentrate significant amounts of authority in the

hands of powerful committee and subcommittee leaders, once again surrendering policy to a narrow subset of its members. From the standpoint of floor voters this is little better than complete abdication to executive branch agencies. As it now works, the system of delegation allows legislators to play off committees against agencies, dividing the labor across the branches so that no one set of actors dominates. Given this perspective, a resuscitated nondelegation doctrine would not only be unnecessary, but also would threaten the very individual liberties that it purports to protect.

What, then, should the attitude of the courts be towards delegation? In our view, delegation is a self-regulating system, not in need of closer attention from the judiciary. Legislators will, over time, adjust the boundaries of the administrative state so that the executive branch considers those issue areas that Congress handles less effectively itself, keeping the system in a rough equilibrium. Forcing Congress to do more legislating would only push back into the halls of the legislature those issues on which the committee system, with its lack of expertise and tendency towards uncontrollable logrolls, produces policy most inefficiently. This would be hardly a step in the right direction.

Consider the position, implied in the majority opinion from *Clinton v. City of New York*, that, when delegating, Congress should provide agencies with a road map or algorithm for translating technical findings into policy, rather than rely more substantially on agencies' policy judgment.[86] The assumption is that, since legislators are elected and bureaucrats are not, policy decisions made in Congress gain legitimacy that agency rulings lack.

But consider a fairly complex policy area—say, airline safety—in which legislators are confident that the regulator's policy goals are nearly identical to their own. Delegating under such circumstances with broad discretion would result in outcomes close to those preferred by legislators and, by transitivity, to those preferred by their constituents as well. Where is the illegitimacy here? And why would Congress delegate broadly to those who do not share their policy goals?[87] In contrast, forcing Congress to provide a detailed policy algorithm may result in the regulator's having to implement policy that neither she nor the legislators in

---

[86] *See* Clinton v. City of New York, 118 S. Ct. 2091 (1998).

[87] Some may protest here that the shared policy goals between legislators and bureaucrats might be the protection of special interests, rather than the public good. But then this is a dissatisfaction with politics in general, not delegation in particular; legislators have provided benefits to favored constituents from Day One of the Republic, and there is no evidence that the problem has intensified in the present Era of Delegation.

the enacting coalition would have preferred. True, a good algorithm will deliver good policy, but relatively uninformed legislators may not even possess sufficient expertise to be sure that their road map will lead to the desired destination, rather than a dead end. Must we sacrifice unanimously agreed upon policy goals in the name of strict procedural orthodoxy?

Rather than meddle in the details of Congress's subcontracting arrangement with the Executive, the courts should content themselves with their three traditional roles in the area of delegation: 1) enforcing a minimally specified nondelegation doctrine, so that some policy goals always accompany delegated authority; 2) vigorously policing agencies' rulemaking procedures, to ensure that those constraints Congress incorporates into the law are in fact carried out in practice as well; and 3) continuing to enfranchise any and all affected interests into the policymaking process, so that bureaucratic malfeasance will be less likely to go unnoticed. In this way, the courts can provide the infrastructure for an effective balance of powers across the branches without denying legislators and their constituents the real benefits of delegation.