# Delegation Compiled

[Delegation Compiled 1](#_Toc298504656)

[\*\*\*Delegation Good 2](#_Toc298504657)

[1NC Shell 3](#_Toc298504658)

[2NC Politics No Link 4](#_Toc298504659)

[2NC Delegation Solves 6](#_Toc298504660)

[2NC Democracy Disad 7](#_Toc298504661)

[2NC Perm Do Both 10](#_Toc298504662)

[2NC Perm Do the CP 11](#_Toc298504663)

[2NC Perm Do the Plan and Delegate 12](#_Toc298504664)

[2NC Delegation Legitimate 13](#_Toc298504665)

[2NC NASA Good 14](#_Toc298504666)

[Politics – Abolishing NASA Unpopular 15](#_Toc298504667)

[Nondelegation Bad – Committees 16](#_Toc298504668)

[Nondelegation Bad – State Control 17](#_Toc298504669)

[Nondelegation Bad – Vagueness 18](#_Toc298504670)

[A2 Schoenbrod 19](#_Toc298504671)

[Delegation k2 policymaking 21](#_Toc298504672)

[Delegation k2 policymaking – delay 22](#_Toc298504673)

[Delegation k2 public participation 23](#_Toc298504674)

[Public Participation k2 policymaking 25](#_Toc298504675)

[Delegation k2 Democracy 26](#_Toc298504676)

[Accountability Inev – Voters 27](#_Toc298504677)

[Accountability Inev – Courts 28](#_Toc298504678)

[Accountability Inev – Congress 29](#_Toc298504679)

[Accountability Inev – Presidents 32](#_Toc298504680)

[Accountability Inev – Three Branches 33](#_Toc298504681)

[Accountability Inev – Media 34](#_Toc298504682)

[Accountability Inev – Interest Groups 35](#_Toc298504683)

[Accountability Inev – Informal Norms 36](#_Toc298504684)

[Unaccountability Inev – AT Courts Solve 37](#_Toc298504685)

[Unaccountability Inev – AT Prez Solve 40](#_Toc298504686)

[AT Unconstitutional 41](#_Toc298504687)

[AT Certain type of delegation 42](#_Toc298504688)

[AT Prez Powers Defense – Bad presidents 43](#_Toc298504689)

[\*\*\*Nondelegation CP 43](#_Toc298504690)

[1NC – Congress CP 44](#_Toc298504691)

[1NC – XO CP 47](#_Toc298504692)

[1NC – NASA Bad 49](#_Toc298504693)

[\*\*\*AGENCIES DON’T SOLVE 51](#_Toc298504694)

[Expertise 52](#_Toc298504695)

[Enforcement 53](#_Toc298504696)

[AT Congress can Repeal 54](#_Toc298504697)

[\*\*\*NASA Bad 56](#_Toc298504698)

[NASA Fails 57](#_Toc298504699)

[Abolish NASA 58](#_Toc298504700)

[\*\*\*DEMOCRACY N.B. 60](#_Toc298504701)

[\*\*\*Links: 61](#_Toc298504702)

[Accountability 62](#_Toc298504703)

[Constitutionality 64](#_Toc298504704)

[Checks and Ballances 65](#_Toc298504705)

[Oversight 66](#_Toc298504706)

[Political Overload 67](#_Toc298504707)

[Power Division 68](#_Toc298504708)

[Public Participation 69](#_Toc298504709)

[Regulation/Centralization 70](#_Toc298504710)

[AT People don’t read Bills 72](#_Toc298504711)

[AT Voters Check Delegation 73](#_Toc298504712)

[\*\*\*Internals: 75](#_Toc298504713)

[Public Participation is key 76](#_Toc298504714)

[\*\*\*A2: WE DON’T LINK TO PTIX 78](#_Toc298504715)

[Generic Agencies Link 79](#_Toc298504716)

[Laundry List 80](#_Toc298504717)

[Expensive Bills 81](#_Toc298504718)

[Lobbying 82](#_Toc298504719)

[Timing 83](#_Toc298504720)

[A2: ‘Arrow’s Theorem’/Congress gets stuck 84](#_Toc298504721)

[\*\*\*THEORY: 86](#_Toc298504722)

[PIC’s Good 87](#_Toc298504723)

[Agent CP’s Good 88](#_Toc298504724)

[\*\*\*DEMOCRACY GOOD 90](#_Toc298504725)

[Climate Change 91](#_Toc298504726)

[Conflict 92](#_Toc298504727)

[Growth 95](#_Toc298504728)

[US Interests 96](#_Toc298504729)

[Famine 97](#_Toc298504730)

[AT K of Democracy 98](#_Toc298504731)

[\*\*\*Democracy Bad 99](#_Toc298504732)

[Imperialism 100](#_Toc298504733)

[Discrimination 101](#_Toc298504734)

[AT Democratic Peace Theory 102](#_Toc298504735)

[AT Democracy Solves Environment 106](#_Toc298504736)

\*\*\*Delegation Good

# 1NC Shell

[counterplan text]

## Delegation let’s Congress avoid backlash – it is comparatively better than the best legislative action

David Epstein, Department of Political Science and Stanford Graduate School of Business, Columbia and Stanford University, and Sharyn O’Hallaron, Department of Political Science and the School of International and Public Affairs and Hoover Institution, Columbia and Stanford University, January 1999 (“The Nondelegation Doctrine and the Separation of Powers” – Cardozo Law Review) p. lexis

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 [\*962] 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. n40 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 [\*963] stand intense scrutiny if something goes wrong. n41 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.

# 2NC Politics No Link

## Delegation lets policymakers avoid backlash – complicated legislation with no clear political benefits can be handed off to executive agencies to shift the blame – that’s Epstein and O’Halloran 99.

**Like spending bills, lawmakers hide costs to avoid blame**

**Schoenbrod**, David *(*Trustee Professor of Law, New York Law School) **‘99** “DELEGATION AND DEMOCRACY: A REPLY TO MY CRITICS” *CARDOZO LAW REVIEW* [Vol. 20:731 1999] http://www.constitution.org/ad\_state/schoenbrod.htm

Unlike Mashaw, members of Congress understand that delegation lets them avoid responsibility. That is why they go to great lengths to use delegation to avoid blame not only for regulation, but also for raising their own salaries.[[69]](http://www.constitution.org/ad_state/schoenbrod.htm#069) If, as Mashaw argues, legislators do not truly avoid blame through delegation, they would not be so reluctant to invoke the Congressional Review Act to try to repeal agency laws with which they disagree. In an attempt to show that ending delegation would be of no benefit, Mashaw points out that spending bills are full of detail, yet “perhaps nowhere in American politics do legislators make better use of selective information and creative incoherence than in explaining to the American people what has been done in constructing the federal budget.”[[70]](http://www.constitution.org/ad_state/schoenbrod.htm#070) Mashaw is right about the legislative appropriations process, but he is wrong to think that legislative lawmaking would work the same way.[[71]](http://www.constitution.org/ad_state/schoenbrod.htm#071) There is an accountability loophole in the Constitution for appropriations, but not lawmaking. The Constitution’s provisions on appropriations were drafted with the expectation that Congress would not run planned budget deficits except to deal with emergencies.[[72]](http://www.constitution.org/ad_state/schoenbrod.htm#072) So long as Congress acted according to that expectation, it could not benefit one interest group without hurting some other group by reducing an appropriation or imposing a tax. Thus, interest would tend to thwart interest, as James Madison predicted.[[73]](http://www.constitution.org/ad_state/schoenbrod.htm#073) When that balanced budget expectation collapsed, more than a century later, Congress could give to Paul without seeming to take from Peter, because the cost of the appropriation is flung forward in time to be borne by persons yet to be identified. In contrast, with lawmaking, a law that benefits Paul will restrict Peter now, and Peter generally will have notice of this law and know whom to blame. Congress takes further advantage of the loophole in accountability for appropriations by lumping thousands of spending items together and voting on them wholesale. There is an implicit agreement in the Senate by which most members do not support amendments that strike items of spending, even those with support in their own states. The reason for the deal is that if such items were individually subject to vote, each senator would lose the ability to deliver pork to his constituents. What holds these thieves’ agreement together is that no senator has a Peter for a constituent who is complaining loudly that a particular item of spending hurts him. But Peter is there when Congress imposes rules of conduct. Unlike the appropriations’ agreements, an agreement to prevent the rule-by-rule consideration of proposed laws would collapse under its own weight. In sum, just because the Constitution has a loophole that permits legislators to hide the ball on spending is no excuse to let them violate the Constitution by hiding the ball on lawmaking.

**Legislatures are selfish – delegations is a tool they use to claim credit, chift blame, and gain campaign contributions**

**Schoenbrod**, David *(*Trustee Professor of Law, New York Law School) **‘99** “DELEGATION AND DEMOCRACY: A REPLY TO MY CRITICS” *CARDOZO LAW REVIEW* [Vol. 20:731 1999] http://www.constitution.org/ad\_state/schoenbrod.htm

Delegation skews Congress’s political incentives toward granting federal agencies comprehensive jurisdiction over large areas of policy, much of which could be left to state and local government. For example, air pollution was being reduced at a relatively steady rate from at least the beginning of the twentieth century.[[127]](http://www.constitution.org/ad_state/schoenbrod.htm#127) The data do not show any uptick in the rate of improvement when the federal government took over in 1970.[[128]](http://www.constitution.org/ad_state/schoenbrod.htm#128) Schuck seems to think that Congress acts in the public interest when it decides to delegate. As he sees the legislative process, the “legislative staffs, the White House, regulated firms, ‘public interest’ groups, state and local governments, and others [fight over the scope and terms of the delegation.]”[[129]](http://www.constitution.org/ad_state/schoenbrod.htm#129) He implies that the balance struck in the legislative fight produces something like the right result. Schuck distrusts legislators to make laws but trusts them in deciding whether to delegate. I distrust them when they make laws and distrust them more when they delegate. Legislators have selfish interests in deciding whether to delegate and so have a conflict of interest. Through delegation, they can claim credit, shift blame, and increase the demand for casework as a means for them to exact campaign contributions and other favors. The stake-holders from the private sector, in contrast, aim to get the law they want, wherever it is made. For them, delegation is only a possible means to that end. The balance on delegation that might be produced by the tugging and hauling between the competing private stakeholders is knocked out of wack by the heavy hands of those with the biggest stakes in delegation and the power to do it, the legislators. Not only does Schuck blink at the selfish interests of the legislators, he also puts too much faith in the idea that all the relevant interests are represented. Just because many well organized interest groups are active in the contest does not guarantee a good outcome as the well organized interests are only a part of the overall public interest. The unorganized interests are the ones most prone to be harmed by delegation.

**Legislatures exploit agencies by increasing their jurisdiction – if a method fails, they avoid blame**

**Schoenbrod**, David *(*Trustee Professor of Law, New York Law School) **‘99** “DELEGATION AND DEMOCRACY: A REPLY TO MY CRITICS” *CARDOZO LAW REVIEW* [Vol. 20:731 1999] http://www.constitution.org/ad\_state/schoenbrod.htm

Even if Mashaw were somehow correct in asserting that delegation does not hinder voters in picking legislators with similar ideologies, he is wrong in thinking that there is no loss of democracy. In the democracy that is our birthright under the Constitution, voters are not consigned to picking representatives in the hope that their representatives’ ideologies will lead them to act in the future as we want. Rather, we can punish legislators who we think voted unwisely by removing them from office at the next election. But with delegation, legislators can distance themselves from much of the blame that results from making decisions on new laws.

Even though legislators may personally share our ideological preferences, political incentives lead them to delegate in ways that do not produce laws that coincide with our views. For example, because they escape much of the blame for the inevitable costs of creating new federal lawmaking programs and also much of the blame for the inevitable failure of these programs to produce the benefits promised, legislators are skewed towards creating and enlarging an agency’s lawmaking jurisdiction, making its goals more ambitious, its methods more intrusive, and its procedures more complicated. The upshot is that, in lawmaking, the national government, particularly the executive branch, increasingly takes jurisdiction over matters that might otherwise be left to the political branches of state or local government, the common law, or private ordering.

**Delegation allows legislators to gain undeserved cred. with constituents**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Review94 Colum. L. Rev. 710 , March 1994

Through **delegation** Congress shirks responsibility for some of the most fundamental political questions affecting our society - for example, how to balance the risk of toxic agents in the workplace against jobs, n16 or how to compare the gravity of drug offenses to espionage activities. n17 Congress has failed to agree upon which military bases to close, n18 and which organizations merit broadcast licenses. n19 Yet members of Congress can claim credit for attempting to solve the problems of the environment and the economy by authorizing agencies to tackle the problems, and then distance themselves from the ensuing regulation if unfavorable to their constituents. **Delegation** permits legislators to "look good" to their constituents without necessarily providing tangible benefits (pp. 8687). n20 Congress may too readily distribute rights without imposing [\*715] commensurate obligations, concealing the tradeoffs that must necessarily follow (p. 9).

**Agencies more influenced than Congress, but act as a shield for legislative blame**

**Krent ’94** Harold J. Krent, Professor of Law, Chicago-Kent College of Law; Columbia Law Review “Book Review: Delegation and Its Discontent; March 1994 ” [http://www.jstor.org/stable/1123205 ?seq=1](http://www.jstor.org/stable/1123205?seq=8) [Schaaf]

In a related argument, Schoenbrod debunks the view that the independence of agencies generates social benefits. Although individual agency officials may be protected by civil service laws and do not rely on campaign contributions, agencies as a whole, he argues, are more subject to influence by concentrated interests than members of Congress (pp. 124-25). Agencies can be captured, at least in part, by the industries they are to regulate, for those industries have great organizational and resource advantages over the public as a whole. At times, Schoenbrod notes, only industry groups participate in agency rule-making (p. 109), and special interest groups enjoy access to agency officials to discuss a wide range of issues (p. 112). Indeed, the apparent independence of agencies makes delegation a more attractive option for legislators, because it insulates them from the blame attached to agency policies even when those policies directly result from legislative direction, whether formal or informal. And the independence of agencies from the President also encourages delegation because Congress need not fear executive branch hegemony over the delegated authority.2

# 2NC Delegation Solves

## Delegation is comparatively better than congressional action – access to more specific information and expertise – avoids Congressional shenanigans like logrolling and delays – that’s Epstein and O’Halloran. Our evidence is comparative with PERFECT congressional action and says Delegation is preferable

**Delegation is normal means – Obama delegating to private sector**

**Heiser 10** (James, The New American, “Obama: Expand NASA's Budget; Change Its Mission”, February 4, 2010, <http://thenewamerican.com/tech-mainmenu-30/space/2885-obama-expand-nasas-budget-change-its-mission>)[KEZIOS]

Last year, President Obama appointed the Augustine Committee to evaluate the manned space programs and make recommendations for the future of the program. A report at Wired.com summarized the committee’s findings last October: Top among them is that NASA does not have enough money to fund a human spaceflight program. The agency needs at least $3 billion more each year to accomplish the goals of exploring beyond low-earth orbit, while maintaining the International Space Station and other scientific programs. While the entire human spaceflight program costs each citizen a mere seven cents per day, according to the report, getting more money for NASA has been a struggle. There are signs, though, that the Obama administration could provide a little more cash for human space exploration. Obama’s proposed budget demonstrates that the administration is prepared to provide more cash for the space agency — about $6 billion annually — but it is not prepared to permit the agency to pursue the past half decade of research and development toward going beyond Earth orbit. According to a New York Times article, “Billions for NASA, With a Push to Find New Ways Into Space”: If Mr. Obama’s proposed budget is implemented, NASA a few years from now would be fundamentally different from NASA today. The space agency would no longer operate its own spacecraft, but essentially buy tickets for its astronauts on commercially launched rockets. It would end its program to return to the moon and would pursue future missions to deep space by drawing more cooperation and financing from other nations.  For some, like Senator Richard C. Shelby, Republican of Alabama, where NASA’s Marshall Space Flight Center has been developing the rockets singled out for cancellation by Mr. Obama’s budget, the proposed changes “begin the death march for the future of U.S. human spaceflight.” Others like Charles Lurio, a space consultant and an advocate of a so-called New Space commercial approach, were ecstatic. “What this potentially gives us is a real space program, not a faux space program,” Mr. Lurio said. “The real one is one that builds a foundation for practical use and exploration.” As expected, Mr. Obama’s proposal seeks to cancel the Ares I rocket, in development for four years as a replacement to the space shuttles. More unexpected, the request also would kill Orion, the crew capsule that was to sit atop the Ares I. The Orion is the only spacecraft in development that would be capable of traveling beyond low Earth orbit. Over all, Mr. Obama’s request would add $6 billion over five years to the NASA budget. The agency is projected to receive $100 billion over the 2011 to 2015 fiscal years. As previously observed, the administration has made tentative steps toward privatization. The Obama plan would rely on private spacecraft to replace the space shuttle in transporting astronauts to and from the International Space Station. But such reliance on private corporations does not mean that NASA’s spending will be cut; as in all budgetary matters under the current administration, the space agency will receive more funding, and although work on Constellation-related project will be cut back, even cancelled, this does not mean that the space agency will not pursue new technologies.

# 2NC Democracy Disad

Public apathy is inevitable – more Congressional action hurts limited attention span

Lovell Assistant Professor of Government, College of William and Mary 2000

George, “That Sick Chicken Won't Hunt: the Limits of a Judicially Enforced Non-Delegation Doctrine,” 17 Const. Commentary 79, lexisnexis

The problem, however, is that critics of delegation wield a double-edged sword when they complain about the mass public's limited capacity to pay attention to regulatory decisions. By emphasizing how difficult it is for the public to pay sufficient attention to the details of government processes, and arguing that it is easy for "sophisticated" interests to dupe the masses, critics of delegation make it more difficult to believe that judges can create significant improvements in accountability by enforcing a strict non-delegation doctrine. It is hard to see how ending delegation will make the masses more sophisticated or lengthen their attention span. n27 [\*94] More importantly, if the courts were to end delegation, the capacity of the public to monitor decisions in Congress would be severely tested. Congress would presumably be forced to make more decisions - and more complicated decisions - about the details of regulatory policies. Presumably, much of the boredom that the public now associates with the administrative processes would simply be transferred to Congress, along with the responsibility for making many of the boring decisions that used to be made in the agencies. The critics of delegation could respond to these concerns by arguing that in today's world of rampant delegation, it is the location, and not the technical content, of the decisions that creates the boredom. Perhaps there is some inherent feature of bureaucratic decision making that mutes public (or perhaps media) attention to agency decisions. Arguments of this sort have been made about judicial decision-making. Girardeau Spann, for example, worries about the power of judges to "legitimate" unpopular outcomes, and suggests that people quietly accept policy outcomes established by judges, even when the same people would actively resist the same policy outcomes had they been established by elected legislators. n28 Unfortunately, however, it is quite difficult to extend Spann's arguments about the mystical legitimating powers of judges to the considerably less mystical powers of bureaucrats. It seems quite unlikely that people on the receiving end of a bad regulation would fail to complain simply because they fell under some hypnotic spell of bureaucratic infallibility. Indeed, critics of delegation sometimes emphasize that one problem with bureaucratic decision making is that the [\*95] public accords bureaucratic decisions less legitimacy than decisions made in Congress. n29

**Delegation key to democracy and effective policymaking.**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), <http://www.constitution.org/ad_state/schuck.htm> [Stolarski]

Nevertheless, I accept almost all of Mashaw’s arguments. Our agreement, I presume, is not due to something in the New Haven water supply. Instead, it reflects administrative law scholars’ familiarity with a wide variety of regulatory schemes and public ad-ministration arrangements. It also reflects our common under-standing that the ubiquity of broad delegations denotes much more than the undoubted desires of politicians to eat their cake and have it too. In my view, delegation—when backed (as it is in our system) by many powerful institutional and informal controls over agency discretion—constitutes one of the most salutary developments in the long struggle to instantiate the often competing values of democratic participation, political accountability, legal regularity, and administrative effectiveness. I wish to make some arguments against a robust nondelegation doctrine (and if it is not robust, there is no point talking about it) that Mashaw does not make.4 In the spirit of Dean Michael Herz’s observation that most broad delegations satisfy the formal requirements of Article I legislation and that the merits of a non-delegation doctrine must therefore turn on functional considera-tions,5 my arguments in favor of broad delegations in many circumstances are functional in nature. I shall organize my arguments around four questions: What is the nature of the delegation problem?; What should be our goals in seeking to control delegation?; In the absence of a nondelegation doctrine, is agency lawmaking effectively constrained?; What would be the consequences of reviving the nondelegation doctrine? My answers to these questions can be briefly stated. First, although it is always difficult and costly for a democratic citizenry to monitor, control, guide, and correct the conduct of its governmental agents,6 this problem has not yet reached the level of serious political dysfunction nor is it the kind of problem for which courts (or even scholars, who are less constrained than judges) can devise an effective doctrinal solution in terms of the desired specificity of statutes. Second, a coherent nondelegation doctrine would not limit itself to the single, simple goal of “responsibility” that is the lodestar of Professor Schoenbrod’s analysis; it would also include other goals that exist in profound tension with that of responsibility. Third, agencies are highly constrained to comply with legislative intent as they understand it, and they are further impelled by other powerful forces to understand this legislative intent in much the way that Congress does.7 In truth, the freedom of agencies “to do as they please”8 is among the least of their problems—and of ours. Finally, the consequences of a robust nondelegation doctrine would be so pernicious that the Court will either never adopt it or will render it toothless.9

## Delegation is a symptom, not a cause of unaccountability – other means of passage make it inevitable

Lovell Assistant Professor of Government, College of William and Mary 2000

George, “That Sick Chicken Won't Hunt: the Limits of a Judicially Enforced Non-Delegation Doctrine,” 17 Const. Commentary 79, lexisnexis

This paper takes the non-delegation doctrine seriously, but argues that even strict judicial enforcement of a ban on legislative delegation will not necessarily result in dramatic improvements in policies or political accountability in the American separation of powers system. n4 Earlier critics of the doctrine make important and compelling points, but their focus on constitutional and practical problems leads many of them to buy into the same misleading assumptions about the connections between delegation and accountability that defenders of the doctrine embrace. This paper instead challenges the non-delegation doctrine by challenging the understanding of political accountability relied upon by proponents of the doctrine. I argue that proponents of the doctrine incorrectly give primacy to legislative decision-making when they think about accountability in our constitutional system, and thus incorrectly conclude that accountability can be established or improved by judicial enforcement of a doctrine that forces legislators to make more decisions. The structure of the Constitution means that even astrictly enforced non-delegation doctrine will not by itself create a system in which accountable legislators have supreme and exclusive law-making authority. To show that judicial enforcement of a non-delegation doctrine cannot solve the problems of accountability identified by the doctrine's proponents, I will provisionally accept some of the key claims made by defenders of the doctrine. I will assume for the sake of argument that the courts have the constitutional authority to enforce a non-delegation doctrine and the practical capability to prevent legislators from delegating lawmaking power to the executive branch. Accepting these assumptions [\*81] allows me to focus on a question that has not yet received enough attention: Would a judicially created "world without delegation" be a world of greater democratic accountability than today's world? I find that the surface attractiveness of the non-delegation doctrine masks some rather large gaps in its proponents' account of the way that representation and democratic accountability work in the American separation of powers system. Proponents of the non-delegation doctrine urge the courts to bring an end to delegation as a means of restoring or improving democratic accountability. And proponents of the doctrine usually do a very good job demonstrating that there are problems with accountability in the current world of rampant delegation. But they have failed to demonstrate a link between accountability and delegation that is strong enough to prove that ending delegation will solve the problems of accountability that they identify. In response, I argue that proponents of the non-delegation doctrine have underestimated the complexity of problems of accountability and thus overestimated the importance of delegation to problems of accountability. Critics of delegation and proponents of the non-delegation doctrine have mistaken one symptom of some underlying problems with accountability in our constitutional system for the cause of those problems. The observation that delegation is a symptom rather than a cause emerges aftera more careful consideration of how legislators and voters could respond to strict judicial enforcement of a non-delegation doctrine. Proponents of the doctrine often admit to considerable uncertainty about the precise results of strict judicial enforcement of the non-delegation doctrine. n5 But they are apparently so unimpressed with the advantages of delegation, and so appalled by the harms they associate with delegation, that they are willing to take a plunge into the unknown. I agree that the precise consequences of a judicial ban on delegation are difficult to predict, but I am less convinced that judicial intervention alone will dramatically improve the capacity of the people to hold legislators accountable or to force legislators to produce better policies. While critics suggest that delegation is an aberration in the constitutional system because it allows legislators to escape accountability, I argue that the Constitution has always allowed, and will continue to allow, legislators to use a wide variety of strategies to avoid accountability. Strict judicial enforcement [\*82] of the non-delegation doctrine may prompt legislators to shift to one of these alternative strategies for escaping accountability. But the non-delegation doctrine cannot create a system in which Congress alone makes the laws or a system in which majoritarian processes in Congress are sufficient to guarantee that outcomes have democratic legitimacy. Thus, while it is possible to imagine some worlds without delegation in which there is greater accountability, it does not seem likely that the courts alone can create such a world. Improved accountability can be achieved within the Constitution's flexible framework only if judicial resolve is accompanied by numerous other, equally revolutionary, changes in the electorate and in the structure of the intermediary organizations (e.g., parties, interest groups, mass-media organizations) through which people participate in politics. Because court enforcement of the non-delegation doctrine cannot force those changes, there is little hope that judicial enforcement of the doctrine will solve the problems of accountability identified by proponents of the non-delegation doctrine.

**Congress doesn’t solve “rule-making” – Unclear legislation makes this inevitable**

**Krent ’94** Harold J. Krent, Professor of Law, Chicago-Kent College of Law; Columbia Law Review “Book Review: Delegation and Its Discontent; March 1994 ” [http://www.jstor.org/stable/1123205 ?seq=1](http://www.jstor.org/stable/1123205?seq=8) [Schaaf]

No matter how rule-like the legislation, questions of judgment almost always will arise in its interpretation and application, leading to formulation of subsidiary rules. Indeed, some rules are so open-ended, like Schoenbrod's hypothetical statute barring unreasonable pollution (p. 182), that subsequent rule-making seems inescapable. Schoenbrod is aware of the problem and argues that the prohibition of unreasonable pollution would nonetheless be constitutional "in a society with a clear understanding of what constituted unreasonable pollution, because that shared connotation would provide a basis for interpretation" (p, 182). Although Schoenbrod does not discuss the Sherman Antitrust Act," Congress evidently based the ban on unreasonable restraints of trade on the "shared connotations” from common-law precedents to which Schoenbrod refers." But time cannot be so easily frozen, and with changed economic understandings and circumstances judges have fashioned new rules under the Act. As justice Scalia has noted, Congress "adopted the term "restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static context that the common law had assigned to the term in l890." Interpretation of both rules and common-law precedents ineluctably converges with rulemaking itself. Schoenbrod’s evident conviction that interpretation can be divorced from rule-making is untenable.

## Non-delegation increases bad laws – causes pork barrel spending and log rolling

Lovell Assistant Professor of Government, College of William and Mary 2000

George, “That Sick Chicken Won't Hunt: the Limits of a Judicially Enforced Non-Delegation Doctrine,” 17 Const. Commentary 79, lexisnexis

Critics suggest that delegation subverts these important constitutional limits on Congress's power. Delegation makes it easier for members of Congress to pass laws in the absence of a strong consensus, and thus more likely that Congress will pass laws without careful deliberation and restraint. While finding consensus will be harder in a world without delegation - in which members of Congress are forced to take responsibility for their decisions - the delays will be desirable since they will allow opportunities for more careful deliberation. In some cases, a ban on delegation may lead Congress to abandon attempts at regulation, an outcome that critics of delegation are often happy to embrace. n31 Once again, however, it is not certain that the only consequences of enforcing a non-delegation doctrine are going to be the ones applauded by the doctrine's proponents. The claim that a non-delegation doctrine will force Congress to deliberate more carefully and inhibit excessive legislation is only believable if members of Congress cannot find alternative means of reaching compromises in the absence of delegation. As things now stand, delegation is not the only means used by members of Congress to find compromises that break stalemates or to avoid responsibility. If the courts made it impossible for Congress to delegate, Congress would be likely to substitute one or more of those other means. For example, legislators deprived of their power to delegate might instead try to reach compromises by increasing pork barrel spending or by logrolling regulatory programs into huge omnibus bills. Such practices are already notorious in those policy areas in which Congress now passes detailed legislation (e.g., taxes and appropriations). Recognizing that the consequences of pork barreling might be even worse than the consequences of delegation, critics of delegation deny that these alternative methods of reaching compromise are a significant concern. Aranson, Gellhorn, and Robinson, for example, reject the suggestion that Congress would increase pork barrel spending, [\*97] claiming: "This argument assumes that the legislature is not already maximizing its return from pork-barrel (private-goods) production. We assume the contrary, however, and conclude that an increase in the cost of delegation will reduce the total output of inappropriate legislation." n32 Aranson, Gellhorn, and Robinson's contrary assumption is itself implausible, as can be seen by using a market metaphor. Enforcing a non-delegation doctrine would presumably change legislators' calculations about the costs of pork barreling. Raising the cost of delegation (or removing delegation from that market altogether) will presumably make legislators eager to purchase more of a substitute good, in this case, pork-barrel legislation. Thus, the level at which a legislature maximizes its return from pork-barrel production in a world of rampant delegation may be much lower than the level at which returns will be maximized in a world with a judicially enforced non-delegation doctrine. Presumably, Congress would also adjust to the world without delegation by making its internal structure more conducive to alternative means of reaching compromises. n33

# 2NC Perm Do Both

1. Links to the net benefit – congressional action is unpopular – delegating at the same time doesn’t shield it

2. No Solvency – causes overlap – independent delegation is more effective than congressional policymaking – the permutation causes confusion upon implementation

# 2NC Perm Do the CP

1. Theory – severs the congressional action of the 1AC – wrecks negative ground – impossible to generate offense when the affirmative changes implementation, perception, politics and spending disads can be mooted – reason to reject the team.

[AT Normal Means]

2. False – implementation by congress is the opposite of delegating responsibility – our O’Halloran and Epstein evidence proves the distinction

# 2NC Perm Do the Plan and Delegate

1. links to the net benefit – plan action is still unpopular

2. instrinsic – it delegates more than the counterplan – wrecks negative ground. Perms can generate new offense or shield affirmatives from net benefits – also proves the resolution is insufficient – vote neg.

# 2NC Delegation Legitimate

Offense

1. Education – delegation versus congressional implementation is a core question of policy – certain agents are more able to solve particular policies than others.

2. Neg Flex – Delegation is vital on a huge topic with no predictable limit – the aff has first and last speech and pick the focus of the debate. Agent counterplans are a substantial part of counterplan ground.

Defense

1. Predictable – the affirmative choice of agent provides a predictable set of agent debates and ground for both sides

2. Lit checks – it’s predictable and relatively balanced on this question

3. Disads don’t solve

A. Comparative solvency - backlash DAs don’t help decide which branch would solve better

B. CPs are needed to deal with intractable problems with the status quo.

# 2NC NASA Good

**NASA is the best agency for exploration and research**

Feng **Hsu**, Ph.D., NASA GSFC, Sr. Fellow, Aerospace Technology Working Group **AND** Ken **Cox**, Ph.D., Founder & Director, Aerospace Technology Working Group **09**

“Sustainable Space Exploration and Space Development, A Unified Strategic Vision –

An Aerospace Technology Working Group White Paper”, <http://www.spacerenaissance.org/papers/A-UnifiedSpaceVision-Hsu-Cox.pdf>, Aerospace Technology Working Group, http://www.spacerenaissance.org/papers/A-UnifiedSpaceVision-Hsu-Cox.pdf [Stolarski]

NASA is the right government agency to conduct the nation’s space exploration programs and projects, including Earth science, space science, and a planetary defense effort. Although an efficient and functioning NASA is critical to the success of the nation’s space exploration programs, NASA and its efforts in manned and robotic planetary science should represent only part of the larger picture of America’s human activities in space. There is a much broader category of human space activity that cannot be handled or managed effectively or successfully by a government agency such as NASA. Even with adequate reform in its governance model, NASA would not be the right institution to lead or manage the nation’s business in Space Development projects. Human space development activities, such as creation of affordable launch vehicles, RLVs, space-based solar power, space tourism, communication satellites, and transEarth or trans-lunar space transportation infrastructure systems are primarily commercial development endeavors that are not only cost-benefit-sensitive in project management, but also subject to fundamental business principles related to profitability, sustainability, and market development. In contrast, space exploration involves human scientific research and development (R&D) activities that require exploring the unknown, “pushing the envelope” to reach new frontiers, and taking higher risks with full government and public support, and these need to be invested in solely by taxpayer contributions. Therefore, NASA should emulate the successful U.S. national research laboratories to focus on becoming an R&D organization dedicated to exploration, planetary research, scientific discovery, and technology development. NASA should not be too conservative in the exploration of new frontiers and unknowns, and should manage significant technical and programmatic risks. For example, if a space exploration project such as a Mars mission is managed without willingness to take even a moderate level of technical risk, then space exploration missions will be too expensive to afford, making it unlikely that successes comparable to the Apollo project could ever be achieved again. Therefore, we suggest that problematic management policies such as full-cost accounting, and most ITAR restrictions should be removed to enable NASA to reach its full potential in space and science exploration.

# Politics – Abolishing NASA Unpopular

## Abolishing NASA would be unpopular – key senators

Simberg, 2003

Rand, “AD ASTRA, SANS NASA,” http://www.transterrestrial.com/archives/002980.html

I haven't really commented on C. Blake Powers' proposal to abolish NASA. I don't necessarily disagree, but I don't think that it's politically realistic. However, he's certainly not alone, and Leonard David has a report from the Telluride Tech Festival a couple of weeks ago, at which apparently many people called for it. Part of the problem is that many who are calling for it now (e.g., Bruce Murray, Lew Branscomb) have always been opposed to the Shuttle and station, and the manned spaceflight program in general, so their calls look like simple political opportunism. Freeman Dyson has a little more credibility, as a long-time proponent of space settlements. But they're all scientists, and we need to get out of the mode of relying on scientists for advice about space policy. Unfortunately, we remain mired in the false association of civil space with science exclusively. The real problem, of course, is that the political imperatives behind NASA have very little to do with actual accomplishments in space. Abolishing, or even restructuring the agency would break many rice bowls, in the districts and states of very powerful congressmen and Senators.

# Nondelegation Bad – Committees

## Delegation is low and constrained and it checks committee power

David Epstein, Department of Political Science and Stanford Graduate School of Business, Columbia and Stanford University, and Sharyn O’Hallaron, Department of Political Science and the School of International and Public Affairs and Hoover Institution, Columbia and Stanford University, January 1999 (“The Nondelegation Doctrine and the Separation of Powers” – Cardozo Law Review) p. lexis

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 [\*986] 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.

# Nondelegation Bad – State Control

## Non-delegation increases state power – net worse for legislation

Lovell Assistant Professor of Government, College of William and Mary 2000

George, “That Sick Chicken Won't Hunt: the Limits of a Judicially Enforced Non-Delegation Doctrine,” 17 Const. Commentary 79, lexisnexis

Ironically, one limit on federal power that does not seem to apply to the states is the non-delegation doctrine itself. While Schoenbrod and other critics of delegation can imaginatively derive a constitutional prohibition on delegation by placing a particular gloss on a particular piece of constitutional text (the first sentence in Article I), n43 there is almost nothing in the Constitution that suggests that a similar prohibition applies to state governments. n44 As state governments assume important regulatory functions now performed by the federal government, it is unlikely that the private interests that are now so successful at pressuring Congress will simply wither away. Their more likely response will be to expand operations in the state capitals. Once there, there is nothing that prevents them from recreating at the state level the incentives to shift many important regulatory decisions to state regulatory agencies. And there is nothing in the case law of the nineteenth or twentieth centuries that could support a Supreme Court effort to stop the state governments should they decide to delegate more. Of course, there is no way to know for certain the extent to which Congress and the states would make these adjustments in response to judicial intervention. But in the face of Schoenbrod's [\*101] admitted uncertainty about what the world will look like without delegation, the possibility of state government delegation, coupled with the much broader police powers retained by the states, creates a counterweight to the optimistic presumption that curbing federal delegation will result in less regulation and/or more liberty. While the non-delegation doctrine may reinvigorate some constitutional limits on federal legislative powers, gains made at the federal level could be more than offset as regulatory responsibilities shift to a level of government that is less subject to the constitutional restraints that Schoenbrod thinks are essential to protecting liberty.

## State governments delegate and undermine representative democracy

Hamilton Associate Professor of Law, Benjamin N. Cardozo School of Law 1995

Marci, Review “Power Without Responsibility: How Congress Abuses the People Through Delegation”, 93 Mich. L. Rev. 1539, LexisNexis

Schoenbrod emphasizes federal representatives' duty to make hard policy choices and argues that their failure of responsibility is of constitutional magnitude. He acknowledges, however, that his theory increases the workload of an already burdened Congress. His proffered remedy is to relieve the national legislature of its national policymaking responsibilities on particular issues and to shift the locus of decisionmaking back to the state and local governments. He does not explain, however, how shifting the locus of decisionmaking to the states serves the people's interest in being truly served by their representatives (pp. 136-37). Shifting decisionmaking responsibility to the states from the federal government does not necessarily cure the problem of abusive delegation. Rather, it simply changes the geographical context. Delegation is as much a problem at the state level as it is at the federal: indeed, some state constitutions delegate legislative decisionmaking responsibilities to administrative agencies, and even back to the voters themselves. n30 Having taken the tack of resorting to state decisionmaking to render his theory of congressional responsibility feasible, Schoenbrod then fails to grapple with one of the most intriguing and underexamined constitutional issues in contemporary America - the constitutionality of popular initiative or referendum lawmaking. The Guarantee Clause states that the "United States shall guarantee to every State in this Union a Republican Form of Government." n31 Popular lawmaking undermines the republican, or representative, form of government. n32 While the issue has not been completely ignored, n33 it has yet to receive widespread attention and [\*1548] has not sparked a significant amount of debate among legal academics. This is a remarkable lacuna in contemporary discourse given the prevalence of popular lawmaking in the states n34 and the interest in civic republicanism.

# Nondelegation Bad – Vagueness

## Nondelegation means legislation will be deliberately vague and rely on courts

Lovell Assistant Professor of Government, College of William and Mary 2000

George, “That Sick Chicken Won't Hunt: the Limits of a Judicially Enforced Non-Delegation Doctrine,” 17 Const. Commentary 79, lexisnexis

Nevertheless, I think proponents of the non-delegation doctrine still need to be quite concerned about the possibility that ending delegation will lead legislators to rely on judges to resolve conflicts over policy choices. The common law is not the only means through which legislative deference to the courts can result in a shift of policy-making responsibility from legislators to judges. In a future world without delegation, the more relevant strategy of legislative deference to the courts would probably be deliberate ambiguity in legislative language. This legislative strategy for avoiding accountability is often overlooked despite the fact that it has long been a most reliable and resilient tool for legislators wishing to avoid accountability. n60 [\*105] Two studies that I conducted of labor reform legislation demonstrate the importance of the strategy of legislative ambiguity. n61 My studies re-examined nineteenth and early twentieth century conflicts between legislatures and the courts by looking at the evolution of several failed reform statutes. The statutes I looked at gave rise to notorious instances of alleged judicial interference with legislative reforms. I was able to show in several cases that the failure of the statutes to attain their advertised goals was not the result of judicial usurpation of legislative power, as earlier scholars had claimed. The failure was instead the result of legislators deliberately using ambiguity in statutory language to shift responsibility for difficult decisions to judges. This political strategy seemed to work even as the reforms failed: Judges typically received most of the blame after they (quite predictably) resolved the ambiguity in the statutes with interpretations that hurt the interests of labor organizations. I first found examples of such deliberate legislative ambiguity in nineteenth century state statutes aimed at judges who were using the common law of criminal conspiracy to control labor organizations. n62 A subsequent longer study found that ambiguity remained an important legislative strategy in a series of federal statutes from 1898-1935, a period that covers the crucial transition from the nineteenth century common law system to the New Deal administrative system. n63 Of course, examples of past use of legislative ambiguity are only relevant here if it is likely that legislators will respond to strict enforcement of a non-delegation doctrine by using ambiguity to shift decisions to judges. My initial but incomplete answer is to point out that legislators have never stopped using the strategy of deliberate ambiguity. Even as Congress has increasingly relied on delegation, judges continue to make important policy decisions as they interpret statutes and oversee decisions made in the agencies. Legislators are well aware of the important role of judges as interpreters of statutes when they draft [\*106] legislation, and have not always been able to resist the temptation to use open-ended language to shift important policy decisions to judges.

# A2 Schoenbrod

**Schoenbrod is wrong – he identifies the wrong goals. He arbitrarily promotes responsibility over participation, deliberate policymaking, instrumental competence, justice and responsiveness.**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

This leads me to my second point. Professor Schoenbrod has identified the wrong goal, or at least has fastened on one goal to the exclusion of other, equally attractive ones. His sole desidera-tum, it would appear, is what he calls “responsibility.” He uses the word no fewer than five times in his one-page introduction, and he mentions no other goal.19 As noted above, I am not certain what he means by this, although he does associate it with making “hard choices.”20 The closest he comes to defining responsibility is to ob-serve that it is “more meaningfully accountable for what [the ad-ministration] does,”21 in contrast to “responsiveness,” which “will give voters what they want.”22 I confess that I thought that giving the voters what they want, and what they thought they voted for, is precisely what democracy is supposed to be about and what advocates of the nondelegation doctrine hope and suppose it will achieve. If that is not Professor Schoenbrod’s objective, then I do not know what is. In any event, political responsibility is no more a self-defining term than is democracy.23 More to the point, responsibility is only one value among others. Let me suggest some additional constitutional and quasi-constitutional goals that any democratic, just, and effective lawmaking system should seek to both reify and advance. Lawmaking should encourage active, meaningful participation by individual citizens and groups affected by the law. It should facilitate and reflect mature deliberation among members of the public and among the lawmakers themselves. Lawmaking should exhibit instrumental competence, in the sense that it implements a satisfactory level of legislative purposes. Lawmaking, as Mashaw notes, should promote justice in individual cases, not merely at wholesale. It should also achieve responsiveness to public preferences, in Professor Schoenbrod’s sense of giving the voters what they (think they) want. Finally, of course, lawmaking in both its procedural and substantive aspects should exemplify and secure the rule of law. The political responsibility that Professor Schoenbrod wants to achieve through more specific statutes must coexist with these goals and will sometimes conflict with them. Even if the nondelegation doctrine would in fact promote political responsibility, which I very much doubt, it would also frustrate some or all of these other values. Mashaw explains, for example, how more specific statutes can undercut both justice in the individual case and responsiveness to diverse local conditions.24 Professor Schoenbrod seems innocent of, or at least unimpressed by, these poignant and inescapable normative and empirical tradeoffs. He assumes that the legislature is the site where the virtues of responsible lawmaking are best achieved; it is there, he suggests, that the public’s values should be expressed and the hard policy choices made. He fails to see, however, that the particular attributes of the legislature’s delegation—its breadth, type, and level—are themselves fundamental policy choices. Moreover, these issues are hardly peripheral to legislative choice. Along with the closely related issue of the scope of the agency’s regulatory authority, they are almost always—and quite explicitly—at the heart of the political debates in Congress over the shape and con-tent of particular pieces of legislation. The optimal specificity and other delegation-related features of the legislation are among the questions on which almost all of the parties to these legislative struggles—congressional committees, legislative staffs, the White House, regulated firms, “public interest” groups, state and local governments, and others—tend to stake out clear positions, for they know the resolution of these questions may well determine the nature and effectiveness of the regulatory scheme being estab-lished.25 The issue of statutory specificity is not resolved sub *silentio* or by default, as Professor Schoenbrod suggests. Rather, it is a focal point of the political maneuvering in the legislature.

## Schoenbrod presupposes the public fails – takes out his entire theory

Hamilton Associate Professor of Law, Benjamin N. Cardozo School of Law 1995

Marci, Review “Power Without Responsibility: How Congress Abuses the People Through Delegation”, 93 Mich. L. Rev. 1539, LexisNexis

Schoenbrod is opposed to the delegation of policy choices to the executive branch because delegation frustrates accountability, thereby endangering liberty (Chapters Six and Seven). Legislators who delegate their substantive policy choices to the administration can take public stands that are popular but that do not solve the particular problem posed. The public is mollified by the stand taken, leaving the administration to work on the problem in relative obscurity. In essence, delegation short-circuits the communication pathway between representatives and their constituents that is necessary to limit legislators' exercise of their power. n22 A tension at the base of Schoenbrod's theory, however, calls into question the entire edifice. On the one hand, he repeatedly faults Congress for failing to shoulder its burden to make hard policy decisions. n23 Representatives should, on his terms, engage their best judgment to solve the difficult and complex national problems facing the country. Such high expectations of representatives tacitly require a belief in the capacity of individuals to do good on behalf of those they represent. On the other hand, his emphasis on factual examples of congressional failure and his rhetoric seem to discount the possibility of such an authentic relationship of trust: "The enduring hope for public virtue is understandable but childish. Most individuals have enough trouble truly loving those with whom they are intimate, so that truly loving the public seems unlikely. We should choose our means of making law without listening to protes- [\*1545] tations of virtue." n24 This apparent concession to public choice theory robs his theory of the philosophical basis necessary to justify his call to responsibility. If virtue is irrelevant, or impossible to expect, then the "means of making law" are nothing more than machinery attached to dysfunctional operators.

**Schoenbrod is wrong – US politics are too dependent on accountability, leading to policymaking that is only effective in the short-term.**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), <http://www.constitution.org/ad_state/schuck.htm> [Stolarski]

I think that Professor Schoenbrod has the problem wrong. The real problem with delegation is not a lack of political “responsibility,” a concept that he deploys frequently but never defines.10 I understand responsibility to be the accountability of elected officials (and the indirect accountability of their appointed agents) to the electorate for significant policy choices. If anything, our political system produces too much of this kind of responsibility. Our system creates incentives for legislators (especially those with relatively short terms of office, like members of Congress) to think so obsessively about their immediate electoral prospects that they are unduly timorous, lacking the leeway that a more Burkean conception of representation requires. Hence, they may neglect longer term social problems whose solutions require immediate sacrifices for delayed gains, problems that demand as much of the legislators’ attention, prudence, and political courage as they can mus-ter.11

# Delegation k2 policymaking

**Responsibility is not the key internal link. Delegation is key to public participation, deliberate policymaking, instrumental competence, justice, and responsiveness.**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

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**Delegation good when Congress gets greedy**

**Krent ’94** Harold J. Krent, Professor of Law, Chicago-Kent College of Law; Columbia Law Review “Book Review: Delegation and Its Discontent; March 1994 ” [http://www.jstor.org/stable/1123205 ?seq=1](http://www.jstor.org/stable/1123205?seq=8) [Schaaf]

At a more general level, delegation should be beneficial from a policy standpoint whenever the potential for rent-seeking or abuse in Congress is greater than in agencies. When members of Congress cannot resist the temptation to vote based on self-interested reasons-as with decisions to close military bases or trim the budget"-agency delegation may be the preferred way to further the public interest, as long as sufficient checks exist on agency policymaking?" Though the need for Congress to tie itself to the mast is perhaps regrettable, Schoenbrod too quickly passes over the potential virtue of some delegation of lawmaking authority.

**Accountability is irrelevant – social complexity solves. Delegation is key to effective long-term policymaking.**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), <http://www.constitution.org/ad_state/schuck.htm> [Stolarski]

I think that Professor Schoenbrod has the problem wrong. The real problem with delegation is not a lack of political “responsibility,” a concept that he deploys frequently but never defines.10 I understand responsibility to be the accountability of elected officials (and the indirect accountability of their appointed agents) to the electorate for significant policy choices. If anything, our political system produces too much of this kind of responsibility. Our system creates incentives for legislators (especially those with relatively short terms of office, like members of Congress) to think so obsessively about their immediate electoral prospects that they are unduly timorous, lacking the leeway that a more Burkean conception of representation requires. Hence, they may neglect longer term social problems whose solutions require immediate sacrifices for delayed gains, problems that demand as much of the legislators’ attention, prudence, and political courage as they can mus-ter.11 Whether we have struck the best balance between account-ability and stewardship that can be achieved in light of the realistic constraints on democratic governance is a vital question to which no one really knows the answer. But, I feel quite certain that non-accountability in Professor Schoenbrod’s sense is, relatively speaking, a non-problem. The greater dilemma, I think, is that growing social complexity has made it far more difficult for legislators (not to mention voters) to accurately predict the consequences of their choices so that they can reason their way to a conclusion as to the best policy choice. If I am right about this, we may need more delegation to agencies, not less.

# Delegation k2 policymaking – delay

**Delegation doesn’t prevent delay**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Review94 Colum. L. Rev. 710 , March 1994

**Schoenbrod** acknowledges that **delegation** can at times overcome legislative gridlock (p. 121). When there is no agreement within Congress over the policy to be adopted, members of Congress may agree instead to delegate that issue to an agency. But in the long run, he argues, such benefit is illusory. Impasse can exist at the agency level as well, or the agency may delay action in light of the absence of any consensus (pp. 12122). Indeed, the procedural requirements confronting agencies may frustrate speedy resolution of the policy issues. n30 **Schoenbrod** recounts the Environmental Protection Agency's (EPA) experience under the Clean Air Act to make his point (pp. 7980), and much the same story can be told about NHTSA's episodic encouragement of passive restraint systems in automobiles. n31 In addition, delays may arise because agency rules are more difficult to enforce than laws. Businesses may refuse to comply with agency directives and seek judicial review, or they may circumvent the new requirement by pressuring influential members of Congress to alter the recently promulgated rule (p. 122). Agency rules may also lack the authoritative force attributed to congressional enactments - Congress has more legitimacy in the eyes of the public, and its laws of general applicability engender more respect than the case-specific determinations (smokestack by smokestack) of agency officials (p. 122). In any event, legislative gridlock may at times be public-regarding if the momentum for change stems from lobbying by special interest groups.

# Delegation k2 public participation

**Delegation can be public-regarding and can avoid greater corruption from congress , also presidential review solves**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Review94 Colum. L. Rev. 710 , March 1994

C. The Potential for Public-Regarding **Delegation Schoenbrod,** however, does not fully explore the possibility that the desirability of **delegation** may turn on contextual factors such as the structure of a particular agency's decision-making, the composition of groups affected by the regulation, the need for flexibility, and the public awareness of the issues. n44 Particularly if legislators are not as venal, nor citizens as gullible, as **Schoenbrod** posits, then **delegation** at times might be public-regarding. The greater the visibility of the regulatory problem, for instance, the less likely that agencies can issue regulations benefitting only special interests. n45 Regulators are more likely to act according to electoral preference on health care reform than on the navel orange marketing order. Moreover, presidential review of agency action in some contexts, particularly through aggressive oversight on the part of the Office of Management and Budget, n46 may also help ensure that agency policymaking enhances welfare, given the President's national constituency. n47 Presidential determinations to close military bases, for instance, n48 may more likely be public-regarding than if Congress made the decision. Agency regulation, in other words, may be a welcome development if existing conditions deter rent-seeking. [\*723] At a more general level, **delegation** should be beneficial from a policy standpoint whenever the potential for rent-seeking or abuse in Congress is greater than in agencies. When members of Congress cannot resist the temptation to vote based on self-interested reasons - as with decisions to close military bases or trim the budget n49 - agency **delegation** may be the preferred way to further the public interest, as long as sufficient checks exist on agency policymaking. n50 Though the need for Congress to tie itself to the mast is perhaps regrettable, **Schoenbrod** too quickly passes over the potential virtue of some **delegation** of lawmaking authority.

**Agency key to public participation – familiarity**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Legislation is only part of the process of responsible lawmaking, and it is becoming a less important part. In some important respects, this is for the better. Today, the administrative agency is often the site where public participation in lawmaking is most accessible, most meaningful, and most effective. The administrative agency is often the most accessible site for public participation because the costs of participating in the rule-making and more informal agency processes, where many of the most important policy choices are in fact made, are likely to be lower than the costs of lobbying or otherwise seeking to influence Congress. Moreover, the institutional culture of the administrative agency, despite its often daunting opacity, is probably more familiar to the average citizen, who deals with bureaucracies constantly and probably works in one, than the exotic, intricate, unruly (and “un-ruley”), insider’s culture of Congress.

**Agency key to public participation – immediacy, transparency, clarity, and better planning**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

The agency is often a more meaningful site for public participation than Congress, because the policy stakes for individuals and interest groups are most immediate, transparent, and well-defined at the agency level. One can scarcely exaggerate the importance of this consideration to the legitimacy of democratic politics and to the substantive content of public policy. After all, it is only at the agency level that the generalities of legislation are broken down and concretized into discrete, specific issues with which affected parties can hope to deal. It is there that the agency commits itself to a particular course of action; because only there does it propose the specific rate it will set, the particular emission level it will pre-scribe, the precise restrictions on private activity it will impose, the exact regulatory definitions it will employ, the kinds of enforcement techniques it will use, the types of information it will collect, and the details relating to the administrative state’s myriad other impacts on citizens and groups. In short, it is only at the agency level that the citizen can know precisely what the statute means to her; how, when, and to what extent it will affect her interests; whether she supports, opposes, or wants changes in what the agency is proposing; whether it is worth her while to participate actively in seeking to influence this particular exercise of governmental power, and if so, how best to go about it; and where other citizens or groups stand on these questions. God and the devil are in the details of policymaking, as they are in most other important things—and the details are to be found at the agency level. This would remain true, moreover, even if the nondelegation doctrine were revived and statutes were written with somewhat greater specificity, for many of the most significant impacts on members of the public would still be indeterminate until the agency grappled with and defined them.

**Agency key to public participation --**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Finally, the agency is often the site in which public participation is most effective. This is not only because the details of the regulatory impacts are hammered out there. It is also because the agency is where the public can best educate the government about the true nature of the problem that Congress has tried to address. Only the interested parties, reacting to specific agency proposals for rules or other actions, possess (or have the incentives to ac-quire) the information necessary to identify, explicate, quantify, and evaluate the real-world consequences of these and alternative proposals. Even when Congress can identify the first-order effects of the laws that it enacts, these direct impacts seldom exhaust the laws’ policy consequences. Indeed, first-order effects of policies usually are less significant than the aggregate of more remote effects that ripple through a complex, interrelated, opaque society. When policies fail, it is usually not because the congressional purpose was misunderstood. More commonly, they fail because Congress did not fully appreciate how the details of policy implementation would confound its purpose. Often, however, this knowledge can only be gained through active public participation in the policymaking process at the agency level where these implementation issues are most clearly focused and the stakes in their correct resolution are highest.

# Public Participation k2 policymaking

**Public participation key to policymaking – focus and accountability are magnified**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

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# Delegation k2 Democracy

**Agencies are more democratic – they’re not influenced by lobbyists**

Amy **McKay** University of Iowa, Iowa City **and** Susan Webb **Yackee** University of Southern California, Los Angeles, **2007**

American Politics Research, “Interest Group Competition on Federal Agency Rules”, [Stolarski]

To assess these relationships, we study 1,693 comments to 40 agency rules. We demonstrate that when one side of a policy issue dominates the public comment process, this dominant side is able to shift the implementation of public policy toward its preferred policy position. In spite of this, we find that interest groups do not strategically respond to the lobbying efforts of opposing groups. That is, we find little evidence of counteractive lobbying in this study. We conclude that the costs associated with submitting comments to rules and monitoring the behavior of opposing interests may preclude some groups from lobbying in a counteractive fashion, even when it would likely be advantageous for them to do so. These findings complement a burgeoning empirical literature on rulemaking (e.g., Cuéllar, 2005; Furlong & Kerwin, 2005; Yackee, 2006, in press; Yackee & Yackee, 2006) by focusing scholarly attention on the overall impact of commenter volume and the potential for interest group competition across administrative agencies and time.

**Agencies actively seek out public participation and interest group involvement – legislation and surveys prove**

Cornelius M.**Kerwin**, Provost, American University, 19**99**

Congressional Quarterly Inc., “Rulemaking: How Government Agencies Write Law and Make Policy”

Informal communication between the interest group and the agency need not flow solely in one direction. Consequently, the respondents were asked how often, if ever, agencies contacted them during the course of rulemaking and the reasons for the contact (Tables 5-9 and S-10). These results suggest that public participation occurs on a regular basis in rulemaking even when interest groups do not initiate the involvement. More than 50 percent of the interest groups reported that agencies were proactive either regularly, frequently or always. It is not surprising that the most common reason for these contacts is to get information for the rule under development. Agencies need this kind of help, especially when dealing, as they often do, with production processes and technology or business practices. Some legislation contains specific provisions empowering agencies to collect this type of information. But the data suggest that agencies are attentive to politics, possible legal challenges, and the conditions they are likely to confront when they attempt to implement and enforce the rule under development. These are the major reasons why an agency would be concerned with a group's reactions to a proposed rule. Getting a group's reaction is not an uncommon reason for initiating contact. It enables an agency to predict the degree of difficulty it will confront if it chooses to move forward with its proposals. Interest groups are not shy about telling agencies when they are unhappy, nor are they loath to threaten political and legal action should the agency proceed on an unacceptable course. What is striking about these elements of the survey is the multidimensional nature of groups' monitoring and influencing behaviors. Although the frequency of use and perceived effectiveness vary widely; no source of information or technique of influence has been abandoned entirely by interest groups. The overall approach appears to be both sophisticated and broad based. The data on the reflective effectiveness of influence mechanisms are especially compelling. They show that informal mechanisms and difficulty-to-observe mechanisms for communicating views to agencies are used a great deal and are thought to be as or more effective than the traditional mechanisms -such as written comment-that figure so prominently in the procedural law and academic literature on rulemaking. But a final issue remains. Does all the effort devoted to participation in rulemaking yield any results?

# Accountability Inev – Voters

## Voters can evaluate whether representatives voted for the agency and they would spin legislation without delegation anyway

Lovell Assistant Professor of Government, College of William and Mary 2000

George, “That Sick Chicken Won't Hunt: the Limits of a Judicially Enforced Non-Delegation Doctrine,” 17 Const. Commentary 79, lexisnexis

Explanation 1: Forcing Congress to go on Record Regarding Unpopular Programs Critics often complain that delegation allows members of Congress to establish new regulatory policies without going on record with a "yes" or "no" vote on particular regulatory rules. For example, Schoenbrod complains that members of Congress could selectively avoid responsibility for the navel orange marketing orders because members never had to indicate unambiguously their approval or disapproval of the orders issued by the executive branch. n20 An initial problem with this complaint is that it is not entirely accurate. Even in a world with delegation, voters can usually trace regulatory decisions to "yes" or "no" votes cast by their representatives in Congress. It is true that members of Congress do not cast "yes" or "no" votes on particular rules created by agencies, but they do quite often need to go on record with "yes" or "no" votes that make agency activities possible. Legislators must cast votes to establish executive branch agencies and to give those agencies the authority to make regulatory decisions. The democratic controls created by such votes weaken over time. (Most of the voters who voted for the legislators who passed the Agricultural Adjustment Act are now dead). But members of Congress need to take at least one vote per year (on the relevant appropriations bill) in order for any regulatory program to continue, and circumstances sometimes force members to cast additional votes on particular programs. Since no regulatory program can operate without being created and continually authorized by Congress, there is nothing about delegation that prevents an unhappy electorate from holding members of Congress accountable for regulatory power exercised by the agencies. Opponents of incumbents are certainly free to make such votes an issue in the next campaign, and they sometimes do. Representative George Nethercutt (R-Washington) recently found this out the hard way from an ad sponsored by some of his political opponents. Nethercutt probably did not know that he had voted for the Endangered [\*91] Species Act twelve times until he saw an ad that recounted his votes on various appropriations and authorizations items. n21 Schoenbrod's own example of delegation gone awry in navel orange regulation confirmsthat regulatory programs can continue only because members of Congress take recorded votes to support them. Schoenbrod notes that the marketing orders he attacks were only possible because Congress passed a special appropriations rider that exempted the orders from the anti-regulatory review programs of Reagan's OMB. In the House, opponents of the marketing orders forced a floor vote on the rider that determined whether the program could continue. The marketing orders won that recorded vote, 319 to 97. n22 That outcome does not bode well for those who think ending delegation will automatically right the ship of state. Sunkist was apparently able to buy elected members of Congress just as easily as Sunkist was able to capture executive branch regulators. n23 Schoenbrod and other critics might respond to these observations by claiming that the problem is not that delegation makes it impossible for the people to hold legislators accountable, but that delegation makes it exceedingly difficult to do so. Schoenbrod claims that delegation is harmful because it allows legislators to hide their choices in technical votes that fail to frame issues clearly: "appropriations riders do not attract the same level of public attention as legislation to raise the price or cut the supply of a widely used commodity." n24 Schoenbrod seems to be suggesting that the people would have paid more attention if Congress had been forced to address the marketing orders more directly, e.g., by voting on the orders themselves rather than on some obscure exemption from a regulatory review procedure. Schoenbrod's suggestion that the people would have paid more attention to a direct congressional endorsement of the price fixing program has some merit. Unfortunately, the suggestion is of limited relevance to the debate over the non-delegation doctrine. The suggestion would be relevant if we imagined that a judicially enforced non-delegation doctrine would force Congress to take a recorded vote on the "Inflate the Price of Orange [\*92] Juice in Order to Line the Pockets of the Fat Cat Orange Growers Act of 2000." The problem, however, is that the non-delegation doctrine, even in the strong form proposed by Schoenbrod, cannot force Congress to address regulatory problems in such a stark form. Since the Constitution explicitly gives Congress control over its internal decision-making procedures, members would retain considerable power to structure votes to serve their own interests and to hide controversial votes. The non-delegation doctrine cannot prevent Congress from burying divisive regulatory decisions in the technical details of omnibus regulatory bills, or in bills with misleading names and provisions. For example, Congress could presumably bundle all the rules in the current Code of Federal Regulations into a single bill. Members of Congress who voted for such a bill could escape responsibility for any unpopular programs included in it by pointing to other, more popular, items in the compromise package. Thus, the desirability of forcing Congress to vote on regulatory rules does not provide much support for theclaim that the non-delegation doctrine will solve the problems of accountability that delegation seems to create. Members of Congress already have to cast such votes in order for agencies to exercise delegated power. The new doctrine would force members of Congress to cast votes on particular rules, but members would retain the ability to shield those votes from public attention and the power to take responsibility for regulatory programs only selectively. Accountability might be improved by forcing Congress to vote separately on each regulatory program, but neither the non-delegation doctrine nor anything else in the Constitution forces Congress to do so.

# Accountability Inev – Courts

**The Courts solve agency responsibility – the Chevron doctrine**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

In exercising their review of agency “actions” (not just rules) under the APA, the courts attempt to discipline the agencies by requiring that their actions conform to congressional intent and, where they enjoy a delegated discretion, that the discretion is not abused. Although I and other scholars have questioned the effectiveness and value of this review in many cases, none of us doubts that agencies invariably fear it, that they seek to tailor their actions (at least those that are reviewable) in anticipation of it, and that the courts do attempt to police agency departures from congressional policy choices, which must often be inferred from general statutory language and other interpretive materials. Although it is true that the Chevron39 doctrine in principle increases the deference to agency interpretations of their governing statutes, many commentators have observed that the courts can, and often do, manipulate this doctrine in order to preserve much of their influence over agency decisions, including enforcing agency fidelity to congressional intent.

Toward the end of his book, Professor Schoenbrod quotes then-professor Scalia to the effect that the nondelegation doctrine amounts to a judicial self-denying ordinance. Justice Scalia, of course, was writing before the Supreme Court in Chevron curbed judicial authority to interpret statutes without regard to the agencies’ own interpretations. In any event, we certainly do not need a nondelegation doctrine to enable Congress to protect its legislative prerogatives from judicial incursion, which was Justice Scalia’s concern. As my colleague Bill Eskridge has carefully documented, Congress possesses ample power to overrule judicial rulings and exercises that power frequently.40 The fact that Congress can do so, however, does not mean that the nondelegation would there-fore not create mischief.41 It would indeed, as I discuss in the final section. It is noteworthy that the Congressional Review Act expressly provides that the courts may not review any congressional action involved in Congress’s review of agency rules,42 and further pro-vides that Congress’s failure to disapprove an agency rule shall not raise any inference concerning “any intent of the Congress.”43 These provisions are the clearest indication, if any were needed, of Congress’s determination to maintain its close control over agency rulemaking as against both the courts and the Executive Branch. Indeed, these instruments of congressional control create a paradoxical situation: By preserving and extending its oversight and veto power over agency decisions, Congress is more willing to delegate power broadly to the agencies, knowing that it can always retrieve and discipline that power if need be.

**All legislation is subject to secondary discretion – If agencies don’t the courts will**

**Krent ’94** Harold J. Krent, Professor of Law, Chicago-Kent College of Law; Columbia Law Review “Book Review: Delegation and Its Discontent; March 1994 ” [http://www.jstor.org/stable/1123205 ?seq=1](http://www.jstor.org/stable/1123205?seq=8) [Schaaf]

Even with more circumscribed statutes, judges must still use discretion in fleshing out the statutory meaning when either the legislative intent, however understood, is unclear, or when unforeseen circumstances arise." judges frequently must create new rules of private conduct in light of either changed economic or political realities." To suggest that legislative intent or purpose controls the judicial determination is, at times, pure fiction."

# Accountability Inev – Congress

**Congress solves agency responsibility – statutory controls**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Congress, of course, writes the statutes that confer and govern agency authority. In doing so, it prescribes the substantive content of that authority, the structure of agency decisionmaking, the procedures through which it occurs, and the informational, budgetary, and other controls to which the agency will be subjected. As Terry Moe,29 McNollgast,30and many other political scientists have shown, Congress uses these controls to shape the administrative process in ways that serve its electoral and policy interests and make it difficult for agencies to threaten those interests.

**Congress solves agency responsibility – legislative history**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Even when Congress enacts vague statutes, it often clarifies their meaning through legislative history. Agencies understand that the committee reports and floor debates serve as important controls on agency discretion. Justice Scalia frequently reminds us, of course, that legislative history can be indeterminate and is often used strategically by members who cannot muster the votes to get their preferences inscribed in the statutory language itself.31 As Judge Harold Levanthal famously put it, using legislative his-tory is like looking out over a crowd in order to find one’s friends.32 Despite these abuses, or rather because of them, legislative history can dictate which policies agencies may and may not adopt.

**Congress solves agency responsibility – oversight**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Congressional oversight of administration is one of the central pillars of the constitutional schemes of checks and balances—or in Richard Neustadt’s phrase, “separate institutions sharing powers.”33 While the nature, quality, and intensity of legislative over-sight vary from committee to committee, it is often used to signal congressional preferences on agency policy issues and to extract policy commitments from agency officials. Agencies fear intrusive oversight and their decisions and behavior often reflect what political scientists refer to as “anticipatory reaction” to those controls.

**Congress solves agency responsibility – appropriations**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

The appropriations process sharply constrains the authority and discretion of agencies. These constraints are imposed through the language of the funding legislation, through formal committee and subcommittee oversight hearings, and through the frequent in-formal interactions between members and agency officials. De-spite congressional rules against including substantive legislation in appropriations bills, it is nonetheless a common practice for appropriations committees to engage in this practice and for agencies to acquiesce and abjectly obey. Indeed, substantive controls on agency policymaking are often included even in the increasingly common omnibus budgetary reconciliation legislation.

**Congress solves agency responsibility – statutory review**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

In addition to the constitutional power to override presidential vetoes, Congress has over the years enacted a grab-bag of pro-visions requiring some agency rules to run the gauntlet of various forms of legislative veto before they could become effective. The Supreme Court decision in INS v. Chadha34 invalidated certain forms of legislative veto but left most others, including report- and-wait provisions, in place. In 1996, Congress extended this form of control to all rules of all federal agencies, as defined in the Administrative Procedure Act (“APA”),35 although the legislation subjects “major rules” to a more intensive review than other rules.

Professor Schoenbrod makes much of the fact that this Congressional Review Act,36 while comprehensive, has not led to any votes of disapproval by Congress; this inaction shows, he says in a vivid simile, that “legislators react to responsibility as vampires do to garlic—they flee.”37 But it shows no such thing. Numerous empirical studies of the operation of the various kinds of legislative vetoes, both before and after Chadha, have found that they generate strong anticipatory reactions by agency officials, often including intensive discussions between those officials and committee members or staff that cause the agency to conform their rules to the wishes of the committee.38 Indeed, recognition of this powerful informal process of congressional review of agency policymaking outside the statutory procedures of the APA has long caused many consumer, environmental, and other “public interest” groups to oppose legislative veto provisions, including the Congressional Review Act, on the ground that it enables industry interests to use congressional staff to gain an extra bite at the regulatory apple.

**Congress solves agency responsibility – confirmation**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Finally, Congress frequently uses its constitutional power to confirm or reject presidential nominees in order to shape agency policies. Again, much of this influence operates through the medium of anticipatory reaction, here on the part of the President who must consider congressional policy and personal preferences when determining whose name to send to Capitol Hill. But congressional influence also often operates through the confirmation hearings when members extract from the nominee explicit commitments to adopt or avoid certain policies. These policy commitments can be quite specific; indeed, they may be even more specific than the statutory commitments that Professor Schoenbrod would require of Congress under a revitalized nondelegation doctrine.

## Congressional influence is inevitable – threat of retaliation keeps them in line

David Epstein, Department of Political Science and Stanford Graduate School of Business, Columbia and Stanford University, and Sharyn O’Hallaron, Department of Political Science and the School of International and Public Affairs and Hoover Institution, Columbia and Stanford University, January 1999 (“The Nondelegation Doctrine and the Separation of Powers” – Cardozo Law Review) p. lexis

In the early 1980s, however, political scientists began to reassess the assumption that Congress has relatively little interest in [\*956] 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). n26 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. n27 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. n28 In a similar vein, McCubbins, Noll, and Weingast n29 and [\*957] Kiewiet and McCubbins n30 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.

**Congressman aren’t all necessarily corrupt – some delegate based on idealogy and citizens blame them for failures, not agencies**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Review94 Colum. L. Rev. 710 , March 1994

The accuracy of the gloomy picture **Schoenbrod** portrays is of course open to dispute. Members of Congress often act from ideology and not just from the desire to maximize their chance for reelection, as **Schoenbrod** recognizes (pp. 8588 & n.23). Citizens may vote for representatives not only on the basis of benefits brought home to their districts, but also on the basis of the candidates' political vision. Some voters also perceive the connection between Congress and agencies and therefore hold legislators responsible for the exercise of delegated authority. Moreover, the nexus between **delegation** and rent-seeking is inexact: Congress at times is quite specific in approving funding for bridges or particular weapon systems that are likely not needed; and some agencies, whether the Federal Reserve Board or the Securities and Exchange Commission, implement statutory directives in a way that may well serve the public interest. Therefore, prohibiting all **delegation** might not enhance [\*716] public welfare, for lawmaking by Congress, at least at times, might be worse.

# Accountability Inev – Presidents

**Obama solves agency responsibility – budgetary, legislative and regulatory review**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Even before agency policies and rules see the light of day, the significant ones are vetted with the Office of Management and Budget (“OMB”)—and, in a few highly controversial and delicate cases (e.g., FDA regulation of tobacco), with the President and his closest political and policy aides. This may take the form of budgetary review, if the agency action would entail significant fiscal impacts; legislative review, if it requires statutory change; or regulatory review, if it meets the OMB criteria. Once again, the greatest impact of these processes is not so much the reviews themselves as the anticipatory reactions of the agency officials and the reviewers. They are keenly mindful of the policy concerns of the relevant congressional committees and key members, who often are consulted informally as part of these processes and usually receive drafts of the review documents before they are released to the public. Although the review process works somewhat differently with respect to the independent regulatory agencies, their vaunted (but to some extent, illusory) independence is designed to make them even more dependent on Congress and responsive to its policy priorities.

# Accountability Inev – Three Branches

**Congress, the President and the Courts can still micromanage the agencies, and their power is still limited by interest groups, the media and informal agency norms.**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Federal agencies, however, are hardly at liberty. They are surrounded by watchdogs with sharp, penetrating teeth. Indeed, what most clearly distinguishes the American administrative state from that of other countries is the pervasive public philosophy of mistrust of government bureaucracies and the subordination of bureaucracy to numerous, diverse, external, power-checking institutions and processes. These institutions, moreover, are remarkably powerful; they routinely shape policy and delve into the intricate details of administration. Their broad array of inducements, both positive and negative, enable them to guide and often deter-mine the agency’s exercise of discretion. In this fundamental sense, the structural preconditions for democratic delegation are satisfied: the legislature is delegating power to a branch whose decisions the legislature and its other agents—for example, the courts and interest groups—can effectively influence, if not wholly con-trol.28 I do not claim that this control is complete, nor should it be if the advantages of technocratic administration are to be realized. Agencies enjoy some leeway and sometimes abuse it. The controls, however, are extensive. Some of these external constraints on bureaucratic policy-making are: (1) Congress; (2) the Executive Office of the President; (3) judicial review; (4) interest group monitors; (5) media; and (6) informal agency norms. It is important, moreover, to re-member that these and other constraints on bureaucracy’s freedom to “do as it pleases” all operate simultaneously. My consideration of them can be brief, as a vast political science literature exists on each.

# Accountability Inev – Media

**The media solves agency responsibility – journalistic investigation, the Federal Advisory Committee Act, the Freedom of Information Act,**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Every agency is surrounded by organs of public communication that focus on its decisions. Some of these media report to a mass audience while others serve highly specialized audiences, including regulated firms, trade associations, consultants, “public interest” groups, Congress, administrative lawyers, and the like. In addition to using conventional journalistic methods of investigation, these media enjoy a legal right of access to agency proceedings under sunshine laws, the Federal Advisory Committee Act,44 the Freedom of Information Act,45 and other such laws. In effect, the media help to police the activities of agencies in ways that en-able both interest groups and Congress to keep the agencies in line.

Agencies, then, know that their actions are likely to come under public scrutiny and must tailor their conduct and decisions accordingly. This is not to deny, of course, that agencies would often prefer to conduct their business in secret and that they sometimes succeed in doing so. It is to say, rather, that intensive media coverage of agency actions makes it almost impossible to shield from public notice the important decisions that deviate significantly from congressional intent.

# Accountability Inev – Interest Groups

**Interest groups can monitor agencies – the Federal Register and informal networks**

Cornelius M.**Kerwin**, Provost, American University, 19**99**

Congressional Quarterly Inc., “Rulemaking: How Government Agencies Write Law and Make Policy”, [Stolarski]

To succeed in the rulemaking process, interest groups must know what the agency is preparing to do and use the mechanism at their disposal to influence it. Neither the case study literature nor material found in the Federal Register particularly instructive on the question of how interest groups monitor rulemaking agencies. In the case study literature, authors are generally concerned with the substance of the rulemaking in question rather than the details of haw interest groups go about their work. And one would not expect to read about the monitoring behavior of interest groups in the preambles of final rules published in the Federal Register. Respondents to the survey were asked the frequency with which they used various devices for monitoring rulemaking (Table S-6). It is evident that interest groups use a host of different devices, some more than others. The Federal Register professional newsletters, and networks of colleagues are used very often; consultants are relied on infrequently. In her study of sources of information for participants in rulemaking, Golden also found the Federal Register trade and professional associations, and informal networks most often used." As we will see, the colleague networks are also prominent in efforts to influence rulemaking (Table 5-7); 40.5 percent of respondents said they used the formation of coalitions "very frequently". The results shown in Tables 5-6 and 5-7 are quite interesting for a number of reasons. From Table S~6 it is evident that interest groups do not rely on a single tactic; they employ several devices on a regular basis. Again, some tactics are preferred over others. The Federal Register coalition formation, and contact with the agency both before and after the notice of proposed rulemaking appear to be used most often. More interesting, and potentially significant, are the interest groups' ratings of the effectiveness of the various tactics (Table 5-8). Here the results are somewhat different from the results on the techniques the groups actually use.

**Interest group monitors solve agency responsibility – participation in decisionmaking and opposition mobilization**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Agencies’ freedom to “do as they please” is further constrained by the close surveillance of their actions by the constellation of interest groups that invariably cluster around them. As students of Congress have pointed out, these groups police the agencies by signaling Congress in a variety of ways whenever the groups think that the agencies are deviating from the policy path that they prefer and that they believe Congress has chosen, regardless of how general or specific the statutory language may be. These groups, of course, further shape agency policies through their participation in formal and informal agency decisionmaking and through their ability to mobilize opposition to these policies. To be sure, these efforts sometimes seek to push the agency to exercise its discretion in a way not intended or permitted by Congress, a circumstance that underlies all concerns about broad delegations. The burden of my comments here, however, is to show that their power to accomplish this end is a highly constrained one.

# Accountability Inev – Informal Norms

**Informal norms solve agency responsibility – professionalism outweighs political or bureaucratic interests**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Finally, agencies are subject to internal limits on their ability to “do as they please.” Or to put the point more precisely, they ordinarily are pleased to do what they think Congress has required—and not only because of the legal and political constraints discussed above. In most if not all agencies, there exists an organizational culture committed to the rule of law. Indeed, as political scientist James Q. Wilson46 has observed, most of the classic complaints about public bureaucracies are really criticisms of agencies for being too legalistic (too rigid, unimaginative, process-oriented, etc.) in their strict adherence to the statute, at least as they under-stand it. In addition, management controls are ordinarily designed to reinforce these tendencies. Moreover, agencies are increasingly staffed by individuals who are professionally trained and whose professional norms, which include a commitment to the rule of law, often contradict or transcend the narrow political or bureaucratic interests that might otherwise lead decisionmakers astray.

# Unaccountability Inev – AT Courts Solve

**Judges are just as subject to influence as agencies – Concentrated interest influence**

**Krent ’94** Harold J. Krent, Professor of Law, Chicago-Kent College of Law; Columbia Law Review “Book Review: Delegation and Its Discontent; March 1994 ” [http://www.jstor.org/stable/1123205 ?seq=1](http://www.jstor.org/stable/1123205?seq=8) [Schaaf]

Moreover, lawmaking by judges may be just as prone to interest group influence as lawmaking by agencies. Concentrated interests possess a distinct advantage in the litigation process because of their access to the resources necessary to conduct skillful and frequent litigation." In addition, the political insulation of judges, which may be less complete than once thought," does not ensure the insulation of the litigation process from the influence of organized groups." Private parties, not judges, determine which cases to bring and which arguments to raise. Schoenbrod's distinction between rules and goals is thus insufficient to confine all rules of private conduct to Congress."

**Congress distancing from regulation inevitable – Courts and subsequent rulemaking**

**Krent ’94** Harold J. Krent, Professor of Law, Chicago-Kent College of Law; Columbia Law Review “Book Review: Delegation and Its Discontent; March 1994 ” [http://www.jstor.org/stable/1123205 ?seq=1](http://www.jstor.org/stable/1123205?seq=8) [Schaaf]

Thus, even when applying or interpreting rules made by Congress, courts and agencies must generally formulate subsidiary rules of private conduct. Whether Congress intends to delegate or not, it evades accountability for the subsidiary rules fashioned outside of Congress. Members of Congress can distance themselves from overprotective or underprotective rulings by the courts or agencies because citizens will not be able to trace certain policy decisions as readily to Congress when the policy is significantly shaped outside of Congress. Indeed, Congress might well respond to a reinvigorated nondelegation doctrine by vesting greater authority in both courts and agencies to fashion controversial policy through adjudication.

**Judicial review doesn’t solve – they are even less accountable**

**Seidenfeld 94,** Professor, Florida State University College of Law, October 1994 (Mark, “A Big Picture Approach to Presidential Influence on Agency Policy-Making” – Iowa Law Review) p. lexis [KEZIOS]

At the outset, it is helpful to note that judicial review of agency decision-making pursuant to broad statutory delegations is unlikely to provide the needed constraint. To review agency decisions meaningfully, ensuring they comport with the polity's values, judges would have to determine the appropriate balance of values that underlie the statute. But the problem arises precisely when Congress has not indicated how that balance is to be struck. Hence, courts would have to import their own notions of the values that appropriately underlie the statute. This does not solve the problem because the counter-majoritarian courts are shielded from electoral accountability to a greater extent than the agency. 45 Judicial review can at best ensure that the agency thought hard about its decision, reasoned logically, and stayed within the permissive bounds of discretion set by the statute; it cannot legitimately reverse the agency for failing to comport with judges' ideas about the polity's values. 46 That the judiciary's lack of political accountability renders it unable to provide the necessary constraint suggests that congressional monitoring of agency decisions after the fact might better constrain agency policy. Although Congress cannot write sufficiently detailed yet flexible statutes to constrain agency decision-making ex-ante, the legislature has several other means of influencing agency policy. For example, Congress can overrule, ex-post, agency policies with which it disagrees. More pragmatically, members of Congress can communicate their views about the meaning of a statute and how it should be implemented in formal congressional hearings and by informal contacts. 47 Congress can also threaten to decrease agency appropriations if an agency persists in implementing a [\*10] policy with which enough influential legislators disagree. 48

**NO court enforcement of the non-delegation doctrine**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Review94 Colum. L. Rev. 710 , March 1994

A. **Schoenbrod's** Proposed Test The nondelegation doctrine today prohibits Congress from delegating policymaking authority unless it has established an intelligible principle to guide agencies in fleshing out the legislative directives. n53 According to the doctrine, if an intelligible principle exists, then judges can use that guide to cabin agency action. n54 The Supreme Court struck down three New Deal statutes on the grounds of excessive **delegation** n55 and, as **Schoenbrod** points out, in the previous two decades the Court had invalidated several statutes in less well-known cases (pp. 3435). n56 Since the 1930s, however, courts have routinely determined in case after case that sufficient legislative direction existed, whether in the language [\*725] of the statute or in its history and context. Thus, the Court has upheld **delegation** to government officials to set "fair and equitable" prices, n57 to award broadcast licenses according to "the public interest," n58 and to proscribe designer drugs that threaten the public welfare. n59 In other words, the intelligible principle test, as employed by the Court, provides no constraint other than a "hint of reserved power." n60

**Schoenbrod** is nonetheless correct that the Court may have abandoned enforcement of the nondelegation doctrine because of the exigencies of the New Deal and World War II, and not because of any inherent judicial incapacity (p. 178). The "switch in time" of the Supreme Court Justices supports that thesis, n61 as does the possibility that the Court became more lenient towards **delegation** because of its repudiation of other efforts to enforce limits on legislative power - the substantive due process review of economic regulation during the Lochner era and the exacting review of public welfare legislation under the Commerce Clause. As John Hart Ely has written, it may be "a case of death by association." n62 **Schoenbrod** urges, therefore, that we reexamine whether an effective test to control **delegation** of lawmaking authority is possible, even if the "intelligible principle" variant is unsuccessful (p. 181).

**The non-delegation doctrine won’t be revived now, and even if it was revived, the courts would render it ineffective. Delegation**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), <http://www.constitution.org/ad_state/schuck.htm> [Stolarski]

I know David Schoenbrod, and he is no Owen Fiss. Yet, if the United States Supreme Court were to resurrect the nondelegation doctrine as Professor Schoenbrod proposes, it would radically in-crease judicial power over vast areas of American life at the expense of the “political” branches (as we quaintly call them). Fiss, my beloved but occasionally misguided colleague, would probably applaud this change, but Professor Schoenbrod, usually so sensible about such things, would surely deplore it. Fortunately, the Court is most unlikely to adopt Professor Schoenbrod’s perverse proposal. Besides, even if the Court did revive the nondelegation doc-trine, it would surely want to neuter it. Like Buddy, our First Dog, the Court lacks the balls to do what the doctrine would require. So much the better for the Court — and for the rest of us (though not for poor Buddy). In explaining why this is so, I have—we all have—the advantage of Jerry Mashaw’s recent and excellent book, Greed, Chaos, and Governance.1 There, Mashaw reviews the arguments for and against delegation using the public choice literature and Professor Schoenbrod’s book2 as analytical foils. I do not accept all of Mashaw’s claims about delegation. He argues, for example, that voters can more readily discern and police a legislator’s preferences through statutory standards like “protect the public health” and “fair and reasonable” than they can through statutory language that prescribes more specific tradeoffs of competing values. This claim is quite implausible as a general matter, although it is surely correct in some subset of cases depending on the particular statutes being compared. Additionally, his statement that his point has not been “to decide the nondelegation doctrine issue conclusively one way or the other”3 strikes me as disingenuous, for his analysis plunges a long, sharp knife deep into the doctrine’s heart, leaving it near death’s door.

## Judges can’t distinguish between accidental and intentional ambiguity

Lovell Assistant Professor of Government, College of William and Mary 2000

George, “That Sick Chicken Won't Hunt: the Limits of a Judicially Enforced Non-Delegation Doctrine,” 17 Const. Commentary 79, lexisnexis

It is because defenders of delegation know that interpretive controversies cannot be eliminated that they are very careful to distinguish impermissible delegation to agencies from the inevitable and perfectly permissible interpretive role that judges will play as they apply legal rules. Schoenbrod, for example, recognizes the problem of ambiguity and goes to considerable effort to explain that judges retain responsibility for interpreting statutes in a world without delegation. n69 He also offers several suggestions for distinguishing law-making from law interpretation, and distinguishes statutes that delegate from statutes that are not specific. n70 However, his suggested method for distinguishing statutes that allow for judicial interpretation from statutes that unconstitutionally delegate legislative power cannot distinguish interpretation that arises from accidental ambiguity from interpretation that results from deliberate ambiguity. Schoenbrod does not even attempt to make that distinction. This omission is crucial because judges will have a very difficult time improving [\*108] accountability through a non-delegation doctrine if they cannot prevent Congress from delegating to the courts.

## Having judges strike down all delegated legislation links to their argument

Lovell Assistant Professor of Government, College of William and Mary 2000

George, “That Sick Chicken Won't Hunt: the Limits of a Judicially Enforced Non-Delegation Doctrine,” 17 Const. Commentary 79, lexisnexis

Thus, there is no guarantee that judges will recognize their own complicity in legislators' deliberate use of ambiguity, even in a post-delegation world in which conscientious judges want to restrict legislators' efforts to use ambiguity in statutes. If legislators did respond to a judicial prohibition on delegation by increasing their use of ambiguity, they might not be able to shift responsibility for decisions to judges as reliably as they have been able to shift responsibility for making substantive regulatory rules to the executive branch. But even if the method of deferral to the judiciary is less reliable, it still undermines the claim that the delegation doctrine forces legislators to assume responsibility for regulatory choices. Moreover, the possibility of inadvertent judicial complicity in legislative efforts to avoid accountability threatens the legitimacy of judicial efforts to prevent delegation. If unelected judges decide to strikedown ninety-nine percent of the regulatory laws that the people's representatives have passed over the last century in the name of forcing greater legislative accountability, those judges had better be pretty confident that doing so does not simply create the appearance of a judicial coup. Since one consequence of strict enforcement of a non-delegation doctrine is likely to be an increased judicial power to make substantive decisions on regulatory policies, it would be quite difficult to avoid that appearance. Whether they like it or not, judges are likely to help Congress to continue to avoid accountability in the uncharted world without delegation.

# Unaccountability Inev – AT Prez Solve

**Presidential control isn’t the solution**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Review94 Colum. L. Rev. 710 , March 1994

Presidential control, according to **Schoenbrod,** is not the solution. Greater executive influence over delegated authority cannot substitute for the leavening effect of bicameralism and presentment. The electorate cannot hold the President responsible for every regulatory action pursued by NHTSA or OSHA given the vast array of criteria under which a President is judged (p. 95). In addition, Presidents may use delegation - in the same manner as Congress - to distance themselves from unpopular measures and curry favor with particularly influential constituents (pp. 9596). Permitting enhanced control privileges flexibility over accountability. Indeed, greater controls by the President pose the additional danger of gradual accumulations of power by the Executive, with insufficient safeguards against dictatorial rule.

# AT Unconstitutional

**Even if the court has a nondelegation doctrine, delegation itself isn’t unconstitutional**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Review94 Colum. L. Rev. 710 , March 1994

In accordance with that reasoning, Congress cannot transfer its own lawmaking power without threatening that allocation of powers. n99 In Touby v. United States, n100 the Court recently commented that "from this language [of "legislative powers'] the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its [lawmaking] power to another Branch of government." n101 [\*736]

Neither the Constitution's text, however, nor the practice of early Congresses, mandates that view. The text refers to legislative powers, but it nowhere defines that term. Few would dispute that the legislature in exercising its authority must fashion rules of private conduct. But that is not to suggest that the term "legislative powers" necessarily refers to making such rules. n102 More plausibly, the legislative powers addressed in Article I denote the authority to pass laws for the purposes specified in Article I, section 8, such as the power to regulate commerce or to provide uniform laws for bankruptcy. Although Congress may not be able to delegate the power to enact formal laws, **delegation** of rule-making authority involves different concerns. Indeed, as a textual matter, the constitutional authorization for Congress to make all laws "necessary and proper for carrying into Execution the foregoing Powers" n103 could readily include delegating policymaking authority, n104 whether in authorizing some other entity to fashion new rules, interpret preexisting rules, or apply rules to different factual situations. The weakness of **Schoenbrod's** argument arises from his premise that "the legislative powers herein granted" must refer to the power of creating rules of private conduct as opposed to the authority to pass laws for the purposes stated in Article I. n105

# AT Certain type of delegation

**Their kind of delegation doesn’t work – agencies need to have decision making power**

**Stewart 86** – Professor of Administrative Law, Harvard University (Richard, “The Uneasy Constitutional Status of the Administrative Agencies,” April 4, 1986, lexis)[KEZIOS]

We need broad delegations to achieve national goals. The delegations required by prescriptive regulation, however, are the wrong type of delegation to the wrong people. Rather than giving federal agencies and reviewing courts the responsibility for designing detailed conduct blueprints or subdelegating power within Congress and the presidency, we should give decisional power back to the various decision makers within the various economic, governmental, and social institutions of our society, transmitting the delegation through new structures that will align their decisions with national goals. Reconstitutive law is not the appropriate means of scrutinizing national objectives in all cases. Prescriptive law is far more appropriate for securing core civil rights, such as the right to be free from racial discrimination. Such rights should be nationally uniform, and are vindicated most appropriately by imposition of correlative legal duties. Regulation of discrimination through a system that allows employers or sellers to discriminate the payment of a fee would demean our national commitment to civil rights, even assuming that such a strategy was equally or more effective than prescriptions in reducing discrimination. In still other areas of regulation, such as airline safety, prescriptive regulation may be preferable because it is more reliable and effective than other approaches. n88 But in many other contexts there are opportunities for far greater use of reconstitutive strategies to advance federal regulatory goals. It will not necessarily be easy to devise and win political support for congressional legislation to eliminate existing prescriptive systems of regulation and adopt reconstitutive alternatives. Increasing congressional reliance over the past two decades on prescriptive strategies is the product of powerful political forces, including the incentives of legislators to use legislation to target benefits to particular interest groups. This targeting often can be achieved most effectively [\*343] through centralized prescription, rather than more generalized reconstitutive strategies. n89 Regulatory agencies, regulated firms, and environmental and consumer advocacy groups have invested heavily in the prevailing system of regulation. In the face of these obstacles, I am buoyed by Professor Pierce's optimism about the political prospects for reconstitutive strategies. n90 I believe that Professor Pierce has correctly assessed the systemic, political implications of *Chadha, Synar,* and other recent decisions making clear that executive officials have the discretion, subject to only limited judicial review, to resolve policy issues left open by statutes. n91 As he points out, these decisions serve to make Congress' decisionmaking responsibility clear and increase its incentives to exercise that responsibility. The courts cannot and should not do more than this. In particular, courts should not attempt to use the delegation doctrine as a weapon to force Congress to legislate more responsibly. For the several reasons already set forth, such judicial efforts would likely have the opposite effect from that intended. Hard work will be needed to devise and secure the adoption of reconstitutive solutions to the central overload and political irresponsibility generated by our prevailing reliance on command law. The energies of academic lawyers, policy analysts, political scientists, and others should be centered on this task, not on supposed constitutional solutions that, in the end, can solve nothing. Here as elsewhere administrative law must escape its preoccupation with what judges say and do, and embrace a broader perspective and responsibility. n92

# AT Prez Powers Defense – Bad presidents

## Bad presidencies are magnified by the structure of executive

Mallaby 00 (Sebastian, Member, Washington Post’s Editorial Board, Foreign Affairs, Jan/Feb)

All of these arguments may have merit. But the evidence cited by both camps can be better explained by the structural weakness of the presidency Take, for example, one celebrated error: President Clinton’s declaration at the start of the Kosovo war that the Serbs need not fear NATO ground troops. This announcement almost certainly cost lives by encouraging the Serbs to believe that America was not serious about stopping ethnic cleansing. The ad hominem school sees in this example proof of Clinton’s incompetence; the sociological school sees in it proof of isolationist pressure, which made the option of ground troops untenable. But a third explanation, offered privately by a top architect of the Kosovo policy is more plausible. According to this official, the president knew that pundits and Congress would criticize whichever policy he chose, Clinton therefore preemptively took ground troops off the table, aware that his critics would then urge him on to a ground war-and also aware that these urgings would convince Belgrade that Washington`s resolve would stiffen with time, rather than weaken. The president’s stand against ground troops was therefore the logical, tactical move of a leader feeling vulnerable to his critics. Other failings of American diplomacy can likewise be accounted for by the advent of the nonexecutive presidency. Several commentators, notably Samuel Huntington and Garry Wills in these pages, have attacked the arrogance of America's presumption to offer moral leadership to the world. But American leaders resort to moral rhetoric largely out of weakness. They fear that their policy will be blocked unless they generate moral momentum powerful enough to overcome domestic opponents. Likewise, critics point to the hypocrisy of the United States on the world stage. America seeks U.N. endorsement when convenient but is slow to pay its U.N. dues; America practices legal abortion at home but denies funds to organizations that do the same abroad. Again, this hypocrisy has everything to do with the weak executive. The president has a favored policy but is powerless to make Congress follow it. Still other critics decry American diplomacy as a rag-bag of narrow agendas: Boeing lobbies for China trade while Cuban-Americans demand sanctions on Cuba, Here, too, presidential power is the issue, A strong presidency might see to it that America pursues its broader national interest, but a weak one cannot. This is why Clinton signed the Helms-Burton sanctions on Cuba even though he knew that these would do dis-proportionate harm to U.S. relations with Canada and Europe. What if America’s nonexecutive presidency is indeed at the root of its diplomatic inadequacy? First, it follows that it is too optimistic to blame Arnerica's foreign policy drift on the weak character of the current president. The institution of the presidency itself is weak, and we would be unwise to assume that a President Gore or Bradley or Bush will perform much better. But it also follows that it is too pessimistic to blame America’s foreign policy drift on cultural forces that nobody can change, such as isolationism or multiculturalism.

\*\*\*Nondelegation CP

# 1NC – Congress CP

**The text should strip the agency used by the aff of rule making authority and then have congress implement the plan. So for asteroid mining it would say**

**Congress should strip NASA of the authority to fund asteroid mining research and development. Congress should fund asteroid mining research and development.**

**CP: Congress should \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.**

**Congress can enact better measures than agencies**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Review94 Colum. L. Rev. 710 , March 1994

Instead, **Schoenbrod** is convinced that Congress, if forced to legislate itself, would enact far sounder measures than agencies currently do through rule-making or adjudication. He argues, as have others, n34 that the Constitution's Article I procedures of bicameralism and presentment n35 restrain excesses, minimize the chance for rent-seeking by interest groups, and discourage arbitrary rule by factions, the forebears of contemporary special interest groups (pp. 10911). Even though lawmakers at times legislate selfishly (pp. 10920), they may well hesitate before engaging in pork-barrel politics that the public can directly attribute to them. Overall, the requirement that both Houses and the President must agree on all legislation provides for more stable rule and protects individuals from government overreaching. He embraces the Madisonian perspective that Article I was intended to moderate legislative proposals, and that public debate during the deliberations in both Houses of Congress and the White House serves an educative function. n36 He notes that the Madisonian argument is supported by economic intuition that increasing the costs of legislation will prevent capture by special interest groups. n37

**Delegation wrecks democracy**

Herrman J.D., University of the Pacific 1997

David, “To Delegate Or Not To Delegate-That Is Preemption: The Lack Of Political Accountability In Administrative Preemption Defies Federalism Constraints On Government Power,” 28 Pac. L.J. 1157, LexisNexis

Accountability for those who make decisions is both critical to the maintenance of democracy n227 and the legitimacy of rule-making. n228 Only when people can be secure in the knowledge that administrative rule-making is being conducted under the watchful eye of elected officials is rule-making validated. n229 Perhaps the most important link in the accountability chain, especially in relation to administrative preemption, exists between Congress and the agencies. Because the hallmark of preemption is the search for clear congressional intent to displace state law, any attempt to expand federal power at the expense of the states must be responsible through the [\*1185] Legislature. n230 Only in this type of system can poor decisions, extending too far into the traditional domain of the states via preemption, be counteracted through new legislation or new representatives. n231 Congressional accountability in a federalist system serves as the backbone for rights-protective legislation, especially in the preemption context where state laws and state autonomy is displaced by federal statutes. n232 Logically, policy decisions and lawmaking power usurped by administrative agencies must also adopt this dimension of the constitutional scheme. n233 The only way to make administrative bodies accountable to voters is by clearly indicating the role of legislators in the administrative rule-making process, thus making elected officials responsible for the actions taken by agency staffers. n234 Therefore, Congress must fulfill the role of overseeing the rule-making process. n235 Although in theory Congress exerts controls and checks over agency staffers, in reality, members of Congress have alternative agendas such as avoiding the blame for unpopular decisions that may jeopardize their stays in office. n236 By failing to provide this check in the context of administrative preemption, Congress has defeated the constitutional mandates of representative democracy and federalism. n237 Many theories attribute congressional accountability to the decisions of administrative agencies, n238 and at the foundation of each is the assumption that Congress can eradicate the issue of accountability simply by taking care in the drafting of [\*1186] statutes. n239 Legislators are capable of writing precise and complete legislation, so that no rules are necessary to achieve the purpose of the statute. n240 But this is hardly ever done, due to conflicting interests, time constraints, and a refusal to take responsibility for lawmaking. n241 Instead, advocates of delegation contend that Congress implements the numerous direct and indirect oversight techniques available to it, and thereby legitimizes administrative agency power. n242

**Democracy prevents war – nations don’t fight with each other and institutional constraints make it impossible**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard University http://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

2. Why there is a Democratic Peace: The Causal Logic

Two types of explanations have been offered for the absence of wars between democracies. The first argues that shared norms prevent democracies from fighting one another. The second claims that institutional (or structural) constraints make it difficult or impossible for a democracy to wage war on another democracy. a. Normative Explanations The normative explanation of the democratic peace argues that norms that democracies share preclude wars between democracies. One version of this argument contends that liberal states do not fight other liberal states because to do so would be to violate the principles of liberalism. Liberal states only wage war when it advances the liberal ends of increased individual freedom. A liberal state cannot advance liberal ends by fighting another liberal state, because that state already upholds the principles of liberalism. In other words, democracies do not fight because liberal ideology provides no justification for wars between liberal democracies.**59** A second version of the normative explanation claims that democracies share a norm of peaceful conflict resolution. This norm applies between and within democratic states. Democracies resolve their domestic conflicts without violence, and they expect that other democracies will resolve inter-democratic international disputes peacefully.**60**

Transparent and accountable democratic decision-making is essential to effective struggles for social justice and even human survival itself – bureaucratic lawmaking is a critical threat

Peter Montague, Co-Director, Environmental Research Foundation, and Publisher, Rachel’s Environmental & Health News, 1998 (“Democracy and the Environment” – Green Left Weekly) http://www.greenleft.org.au/back/1998/337/337p12.htm

The environmental movement is treading water and slowly drowning. There is abundant evidence that our efforts -- and they have been formidable, even heroic -- have largely failed. After 30 years of exceedingly hard work and tremendous sacrifice, we have failed to stem the tide of environmental deterioration. Make no mistake: our efforts have had a beneficial effect. Things would be much worse today if our work of the past 30 years had never occurred. However, the question is, Have our efforts been adequate? Have we succeeded? Have we even come close to stemming the tide of destruction? Has our vision been commensurate with the scale and scope of the problems we set out to solve? To those questions, if we are honest with ourselves, we must answer No. What, then, are we to do? This article is intended to provoke thought and debate, and certainly is not offered as the last word on anything. Openness Open, democratic decision-making will be an essential component of any successful strategy. After the Berlin wall fell, we got a glimpse of what had happened to the environment and the people under the Soviet dictatorship. The Soviets had some of the world's strictest environmental laws on the books, but without the ability for citizens to participate in decisions, or blow the whistle on egregious violations, those laws meant nothing. For the same reason that science cannot find reliable answers without open peer review, bureaucracies (whether public or private) cannot achieve beneficial results without active citizen participation in decisions and strong protection for whistle-blowers. Errors remain uncorrected, narrow perspectives and selfish motives are rewarded, and the general welfare will not usually be promoted. The fundamental importance of democratic decision-making means that our strategies must not focus on legislative battles. Clearly, we must contend for the full power of government to be harnessed toward achieving our goals, but this is quite different from focusing our efforts on lobbying campaigns to convince legislators to do the right thing from time to time. Lobbying can mobilise people for the short term, but mobilising is not the same as organising. During the past 30 years, the environmental movement has had some notable successes mobilising people, but few successes building long-term organisations that people can live their lives around and within (the way many families in the '30s, '40s and '50s lived their lives around and within their unions' struggles). The focus of our strategies must be on building organisations that involve people and, in that process, finding new allies. The power to govern would naturally flow from those efforts. This question of democracy is not trivial. It is deep. And it deeply divides the environmental movement, or rather movements. Many members of the mainstream environmental movement tend to view ordinary people as the enemy (for example, they love to say, “We have met the enemy and he is us”.). They fundamentally don't trust people to make good decisions, so they prefer to leave ordinary people out of the equation. Instead, they scheme with lawyers and experts behind closed doors, then announce their “solution”. Then they lobby Congress in hopes that Congress will impose this latest “solution” on us all. Naturally, such people don't develop a big following, and their “solutions” -- even when Congress has been willing to impose them -- have often proven to be expensive, burdensome and ultimately unsuccessful. Experts In the modern era, open democratic decision-making is essential to survival. Only by informing people, and trusting their decisions, can we survive as a human society. Our technologies are now too complex and too powerful to be left solely in the hands of a few experts. If they are allowed to make decisions behind closed doors, small groups of experts can make fatal errors. One thinks of the old Atomic Energy Commission (AEC) justifying above-ground nuclear weapons testing. In the early 1950s, their atomic fallout was showering the population with strontium-90, a highly radioactive element that masquerades as calcium when it is taken into the body. Once in the body, strontium-90 moves into the bones, where it irradiates the bone marrow, causing cancer. The AEC's best and brightest studied this problem in detail and argued in secret memos that the only way strontium-90 could get into humans would be through cattle grazing on contaminated grass. They calculated the strontium-90 intake of the cows, and the amount that would end up in the cows' bones. On that basis, the AEC reported to Congress in 1953, “The only potential hazard to human beings would be the ingestion of bone splinters which might be intermingled with muscle tissue in butchering and cutting of the meat. An insignificant amount would enter the body in this fashion.” Thus, they concluded, strontium-90 was not endangering people. The following year, Congress declassified many of the AEC's deliberations. As soon as these memos became public, scientists and citizens began asking, “What about the cows' milk?” The AEC scientists had no response. They had neglected to ask whether strontium-90, mimicking calcium, would contaminate cows' milk, which of course it did. Secrecy in government and corporate decision-making continues to threaten the well-being of everyone on the planet as new technologies are deployed at an accelerating pace after inadequate consideration of their effects. Open, democratic decision-making is no longer a luxury. In the modern world, it is a necessity for human survival.

# 1NC – XO CP

**CP: Obama should \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.**

**Delegation fails – Only presidential oversight solves**

**Seidenfeld 94,** Professor, Florida State University College of Law, October 1994 (Mark, “A Big Picture Approach to Presidential Influence on Agency Policy-Making” – Iowa Law Review) p. lexis [KEZIOS]

The executive does not share the institutional barriers to action that limit congressional oversight of agency policy. The executive is hierarchically arranged, which allows more efficient flow of information and analyses to the ultimate decision-maker. 66 That decision-maker, whether it be the President or an official to whom he has delegated the task, can act unilaterally and therefore expediently. 67 Thus, if any single institution is well suited for monitoring overall government policy, it is the White House. Unlike the courts and even the agencies themselves, the President is [\*13] directly elected and hence politically accountable. Thus, we should expect presidential influence on agency decision-making to constrain agency policy to conform to democratically determined values. 68 Furthermore, the President is the unique official who is answerable to the entire electorate. 69 Consequently, the President stands to pay a price if his policies benefit special interest groups to the detriment of society as a whole. 70 Finally, because the President's jurisdiction is universal, he must maintain a generalist's perspective that allows him to recognize when various agencies' policies act at cross-purposes. He has the incentive to coordinate the policies of various agencies, each of which may be responding to its unique perspective and peculiar constituency. 71 Moreover, the White House may be the only governmental institution capable of successfully coordinating government policy and creating a coherent agenda because only the President has the political base necessary to pressure Congress and the agencies to follow his lead on a wide variety of issues. 72 In sum, presidential influence is crucial to keeping agency policies politically accountable because the White House is the only institution with the structure, incentives, and power to perform the job with an eye towards the public interest.

**Delegation wrecks democracy**

Herrman J.D., University of the Pacific 1997

David, “To Delegate Or Not To Delegate-That Is Preemption: The Lack Of Political Accountability In Administrative Preemption Defies Federalism Constraints On Government Power,” 28 Pac. L.J. 1157, LexisNexis

Accountability for those who make decisions is both critical to the maintenance of democracy n227 and the legitimacy of rule-making. n228 Only when people can be secure in the knowledge that administrative rule-making is being conducted under the watchful eye of elected officials is rule-making validated. n229 Perhaps the most important link in the accountability chain, especially in relation to administrative preemption, exists between Congress and the agencies. Because the hallmark of preemption is the search for clear congressional intent to displace state law, any attempt to expand federal power at the expense of the states must be responsible through the [\*1185] Legislature. n230 Only in this type of system can poor decisions, extending too far into the traditional domain of the states via preemption, be counteracted through new legislation or new representatives. n231 Congressional accountability in a federalist system serves as the backbone for rights-protective legislation, especially in the preemption context where state laws and state autonomy is displaced by federal statutes. n232 Logically, policy decisions and lawmaking power usurped by administrative agencies must also adopt this dimension of the constitutional scheme. n233 The only way to make administrative bodies accountable to voters is by clearly indicating the role of legislators in the administrative rule-making process, thus making elected officials responsible for the actions taken by agency staffers. n234 Therefore, Congress must fulfill the role of overseeing the rule-making process. n235 Although in theory Congress exerts controls and checks over agency staffers, in reality, members of Congress have alternative agendas such as avoiding the blame for unpopular decisions that may jeopardize their stays in office. n236 By failing to provide this check in the context of administrative preemption, Congress has defeated the constitutional mandates of representative democracy and federalism. n237 Many theories attribute congressional accountability to the decisions of administrative agencies, n238 and at the foundation of each is the assumption that Congress can eradicate the issue of accountability simply by taking care in the drafting of [\*1186] statutes. n239 Legislators are capable of writing precise and complete legislation, so that no rules are necessary to achieve the purpose of the statute. n240 But this is hardly ever done, due to conflicting interests, time constraints, and a refusal to take responsibility for lawmaking. n241 Instead, advocates of delegation contend that Congress implements the numerous direct and indirect oversight techniques available to it, and thereby legitimizes administrative agency power. n242

**Democracy prevents war – nations don’t fight with each other and institutional constraints make it impossible**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard University http://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

2. Why there is a Democratic Peace: The Causal Logic

Two types of explanations have been offered for the absence of wars between democracies. The first argues that shared norms prevent democracies from fighting one another. The second claims that institutional (or structural) constraints make it difficult or impossible for a democracy to wage war on another democracy.

a. Normative Explanations

The normative explanation of the democratic peace argues that norms that democracies share preclude wars between democracies. One version of this argument contends that liberal states do not fight other liberal states because to do so would be to violate the principles of liberalism. Liberal states only wage war when it advances the liberal ends of increased individual freedom. A liberal state cannot advance liberal ends by fighting another liberal state, because that state already upholds the principles of liberalism. In other words, democracies do not fight because liberal ideology provides no justification for wars between liberal democracies.**59** A second version of the normative explanation claims that democracies share a norm of peaceful conflict resolution. This norm applies between and within democratic states. Democracies resolve their domestic conflicts without violence, and they expect that other democracies will resolve inter-democratic international disputes peacefully.**60**

# 1NC – NASA Bad

**NASA empirically fails – lack of documentation caused Constellation to fail because it repeats its mistakes and doesn’t build on its successes**

Feng **Hsu**, Ph.D., NASA GSFC, Sr. Fellow, Aerospace Technology Working Group **AND** Ken **Cox**, Ph.D., Founder & Director, Aerospace Technology Working Group **09**

“Sustainable Space Exploration and Space Development, A Unified Strategic Vision –

An Aerospace Technology Working Group White Paper”, Aerospace Technology Working Group, [Stolarski]

The Apollo program was launched without a strategic vision from the outset, so in hindsight it’s not surprising that the agency lost its direction after the space race was won. Evidence of this shortsightedness includes the fact that many of Apollo’s systems were not adequately documented, and NASA itself did not develop an effective “corporate memory” of its significant achievements and failures. The lack of memory has negatively impacted the current Constellation program because it has been difficult for today’s designers, engineers, and managers to understand and benefit from some critical technical achievements of the Apollo era, such as the Saturn-V launch vehicle systems.

# \*\*\*AGENCIES DON’T SOLVE

# Expertise

**Agencies are no more qualified than congress – They both use limited expertise and are influenced by politics**

**Krent ’94** Harold J. Krent, Professor of Law, Chicago-Kent College of Law; Columbia Law Review “Book Review: Delegation and Its Discontent; March 1994 ” http://www.jstor.org/stable/1123205 ?seq=1 [Schaaf]

With respect to the presumed expertise of agencies, Schoenbrod argues first that agency heads typically are not any more expert than legislators (p. 120). Although agencies employ scientists and engineers, the judgments of agency experts are subject to and often altered by the political priorities of agency heads (p. 100). Instead, Congress can, and does,25 use professionals to aid its legislative efforts (p. 120). Second, Schoenbrod argues that technical responsibilities cannot be delegated apart from underlying public policy issues (p. 119). For example, automobile safety standards cannot be mandated without taking into account the problem of costs and international competition in the auto industry. In other words, there is rarely an issue facing the Office of Safety and Health Administration (OSHA) or the National Highway Transportation Safety Administration (NHTSA) that can be resolved without resorting to some political judgment.

# Enforcement

**Delegation fails – congress can’t enforce effective policy**

**Seidenfeld 94,** Professor, Florida State University College of Law, October 1994 (Mark, “A Big Picture Approach to Presidential Influence on Agency Policy-Making” – Iowa Law Review) p. lexis [KEZIOS]

The need for presidential oversight of agency policy-making stems from the nature of the modern administrative state and Congress's inability to monitor effectively such policy-making after the fact. Today the role of government extends beyond mere protection of private property and provision of enforcement mechanisms for private agreements. Most citizens expect the federal government to regulate private markets when they are characterized by imperfections or externalities, 25 to prohibit activities that threaten public health and welfare, 26 and generally to create opportunities [\*6] for individuals to pursue their personal fulfillment. 27 This expansive federal role entails the government setting policies on many complex regulatory matters and often requires a quick governmental response to regulatory problems. Unfortunately the legislative process is cumbersome and geared toward political deal-making rather than definition of coherent policy. 28 Thus, it may be impossible for Congress to achieve its regulatory goals by enacting detailed statutory prescriptions; Congress may have to delegate broad policy-setting discretion to agencies, which it may not be able to control. 29 Some recent attempts by Congress to control agency discretion by detailed statutory prescription 30 -- most notably those directing EPA action 31 -- illustrate the potential problems with this approach to legislative control over regulatory policy. Legislators tend to promise to meet the electorate's aspirations without seriously considering the costs of doing so. Hence, when Congress dictates detailed policy it often promises the impossible and fails to fund adequately the programs it establishes. 32 [\*7] Statutory action-forcing mechanisms meant to coerce agencies to deliver these promises, such as deadlines for adopting regulations and citizen suit provisions, 33 leave agency agendas vulnerable to efforts by particular interest groups that may not have the public interest at heart. 34 Thus the EPA, for example, often finds itself prioritizing its regulatory programs based on pressures from members of Congress, whose constituents may have a peculiar environmental concern, or lawsuits by environmental groups that also have their unique peeves, rather than according to objective assessments of which regulations are likely to provide the greatest benefit. 35 Detailed statutory prescription of policy does not appear to be the panacea for the country's regulatory woes. 36 Moreover, even when the legislature means to constrain agency policy-setting tightly by statute, pragmatic considerations may lead Congress to leave the agency significant discretion. 37 Congress frequently does not have sufficient information to prescribe an effective policy when it adopts legislation aimed at alleviating a particular problem. 38 Congress also is unlikely to have the expertise to write statutory provisions governing the details of regulatory policy in the myriad of regulatory contexts that arise. In addition, statutory prescriptions, once enacted, are not easily changed. Hence, detailed statutory provisions may become outdated or a consensus may develop that they are unwise, 39 yet they may remain on the books, [\*8] hindering effective regulation. Perhaps for this reason, even when Congress has sought to control regulatory policy explicitly by statute, it frequently has done so by mandating regulatory deadlines or results that the agency must achieve rather than by directly specifying mechanisms to achieve the statutory goals. 40 In choosing such mechanisms, an agency still may have to balance potentially conflicting values that Congress has identified as relevant to the statutory scheme, but for which Congress has given no prescription about how to factor into particular regulatory decisions. 41 More disturbingly, in practice, an agency operating under detailed statutory prescriptions may still be forced to import its own value choices into those the statute explicitly makes relevant. For example, regardless of the detail with which statutes prescribe policy, if Congress does not appropriate sufficient funding for full implementation, an agency will have to make trade-offs between the regulatory programs it administers. 42 In other words, the size and complexity of the government's regulatory role make it impossible for Congress to set forth sufficiently detailed criteria in statutes that would both dictate regulatory decisions in particular contexts and still be sufficiently flexible to allow wise and efficient regulation. 43 Pragmatically, Congress is forced to grant agencies [\*9] much policy-setting discretion. 44 Unless there is some constraint other than detailed statutory prescription to keep agency regulations consistent with the values of the polity, such broad delegation of policy-setting functions runs counter to the principle that the government should rely on democratic processes to define fundamental policy.

# AT Congress can Repeal

**Delegation means laws can pass because Congress didn’t act, and they won’t – empirics prove**

Schoenbrod Professor, New York Law School 1999

David, “Symposium: the Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives Delegation and Democracy: a Reply to My Critics,” Cardoza Law Review, 20 Cardozo L. Rev. 731, LexisNexis, HC

3. The Final Rationale: Congress Can Repeal Agency Laws The Supreme Court's final rationale is that delegation does no real harm to democracy because Congress retains the power to en [\*739] act a statute, repealing whatever agency-made laws that it does not approve. n45 This rationale reverses the burden that the Constitution places on those who want to expand the powers of government by imposing a new law. Under the Constitution, the proponents of the new law must bear the burden of getting it approved by the House, the Senate, and the President. n46 Under the last rationale, inaction by either House is sufficient for the agency-made law to stay in effect. There are, of course, many ways to prevent a controversial bill from coming to the floor for a vote, and legislators are only too willing to avoid controversial votes. As a result, laws are sustained without any legislative accountability. The Supreme Court understands perfectly well that legislators bear little responsibility for inaction, and so it refuses to rely upon legislative inaction in interpreting statutes. n47 It is utterly unprincipled to claim that legislative inaction, somehow squares delegation with Article I of the Constitution. Indeed, the Supreme Court has come close to recognizing this much. In INS v. Chadha, n48 it stated, "to allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I." n49 Congress has recently provided us with a laboratory experiment to see if legislators are willing to step forward to repeal agency laws with which they disagree. In the name of congressional responsibility, Congress enacted the Congressional Review Act, n50 which sets up expedited procedures for floor votes to repeal new agency laws before they go into effect. n51 In the first eighteen months of this procedure, agencies promulgated thousands of regulations, many of which have been criticized by legislators. But the Senate voted on only one of them, and the House on none. n52 The experiment shows that legislators react to responsibility as vampires do to garlic - they flee. n53

# \*\*\*NASA Bad

# NASA Fails

**NASA can’t do development projects**

Feng **Hsu**, Ph.D., NASA GSFC, Sr. Fellow, Aerospace Technology Working Group **AND** Ken **Cox**, Ph.D., Founder & Director, Aerospace Technology Working Group **09**

“Sustainable Space Exploration and Space Development, A Unified Strategic Vision –

An Aerospace Technology Working Group White Paper”, http://www.spacerenaissance.org/papers/A-UnifiedSpaceVision-Hsu-Cox.pdf, Aerospace Technology Working Group, http://www.spacerenaissance.org/papers/A-UnifiedSpaceVision-Hsu-Cox.pdf [Stolarski]

Even with adequate reform in its governance model, NASA would not be the right institution to lead or manage the nation’s business in Space Development projects. Human space development activities, such as creation of affordable launch vehicles, RLVs, space-based solar power, space tourism, communication satellites, and transEarth or trans-lunar space transportation infrastructure systems are primarily commercial development endeavors that are not only cost-benefit-sensitive in project management, but also subject to fundamental business principles related to profitability, sustainability, and market development.

**NASA’s designed for the Cold War – it’s too outdated**

Feng **Hsu**, Ph.D., NASA GSFC, Sr. Fellow, Aerospace Technology Working Group **AND** Ken **Cox**, Ph.D., Founder & Director, Aerospace Technology Working Group **09**

“Sustainable Space Exploration and Space Development, A Unified Strategic Vision –

An Aerospace Technology Working Group White Paper”, Aerospace Technology Working Group, [Stolarski]

NASA achieved astonishing successes in the Apollo era of Moon landings, nearly four decades ago. Unfortunately, these were followed rather quickly by the frustrations of a series of compromised programs, cost overruns, and project cancellations. We believe that the causes are rooted in the same reasons that led to the creation of NASA in the late 1950s. NASA was created primarily to respond to the challenges of the Space Race during the Cold War era, and it was a unique organization extremely capable of taking on the urgent national challenge of Apollo. In winning the space race, NASA did exactly what it was designed to achieve. But its lackluster performance since then is also a consequence of the same forces that made the agency so successful during Apollo, for at root, the agency was never set up to envision, create, manage a long-term development process such as what is needed today.

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An Aerospace Technology Working Group White Paper”, Aerospace Technology Working Group, [Stolarski]

In addition, it should be noted that NASA’s governing paradigm emerged from its military roots, for the agency was set originally in 1915 to serve the needs of the military in the development of combat aviation capabilities, and was converted to a space agency in 1958 for the purpose of winning the Space Race. Hence, NASA was created in a hurry to satisfy the nation’s immediate need, but was never developed as a well-structured government institution created to address for America’s long-term strategic goals beyond Apollo or the Cold War. Today NASA is characterized by fierce turf battles among the ten NASA field centers, and damaging competition for the funding that each needs to survive.

But today’s strategic interests clearly lie in ensuring our national security by strengthening the U.S. economy and world economies, as well as enhancing our leadership in science exploration and technology development, and in promoting world peace for sustainable human development.

# Abolish NASA

**We must abolish NASA**

**Grichar**, Jim (formerly an economist with the federal government, writes to "un-spin" the federal government's attempt to con the public. He teaches economics part-time at a community college and provides economic consulting services to the private sector.) Wielding the Budget Axe: It’s Time to Abolish NASA” **’04** http://www.lewrockwell.com/grichar/grichar33.html

Abolishing NASA – What would happen?

President Bush’s latest proposal to reprogram and add money to the NASA budget is just another attempt to give new life to an old boondoggle. By saving manned space flight via a proposal to explore another planet, Bush is attempting to save jobs in Texas (the Johnson Space Flight Center) and other areas and provide continued employment in the aerospace industry. He clearly wants to lock up the Star Trek and engineering/science vote for 2004. But what would likely happen if taxpayers forced the closure of NASA? First, NASA scientists and engineers as well as those in the aerospace industry would be forced to work in the private sector and thus turn their attention to bringing out new products and services for consumers, products and services that consumers could afford to buy and that would be useful to them, not just useful to a few scientists and engineers. NASA’s existing laboratories and facilities would likely go out of business as their budgets were abolished, although the private sector – to the extent it judged it profitable – might bid for those resources. One area where the private sector might take over NASA resources is in earth sciences, where robot satellites are used to gain information about the earth, including temperature readings and geological assessments. Commercial demand exists for more accurate weather forecasts and for geological and geographical information, and these government-employed resources might well be profitably useful in the private sector. Other NASA laboratories, most often conducting research that is less directly applicable to commercial products, would either go out of business or be bought up by universities, defense or aerospace firms or other private foundations that might be interested in funding such efforts. Most, if not all, of the manned space effort would probably be halted. Given the fact that robot satellites can do most of the things that the exceedingly more expensive manned flights can do, it would not make much sense for the private sector, at this time, to spend the multi-billions it would take to run such an effort. Someday, with the right prices and costs, the private sector will undertake manned space flight, but not until it pays. NASA, like other government programs, promises a lot but delivers far less than it costs taxpayers. Instead of expanding the program and giving it a new lease on life, the public should pressure Congress to send President Bush a message and abolish the whole agency as NASA has not, and cannot, deliver what it promises. In a time of record and possibly rising budget deficits, the Congress ought to commit the savings from NASA towards reducing the deficit. Such a move would not only save the public money but would also alert the various lobbyists and other porkmeisters that the days of being conned into throwing taxpayers' money away on useless projects was ending.

# \*\*\*DEMOCRACY N.B.

# \*\*\*Links:

# Accountability

**Delegation wrecks democratic accountability**

Schoenbrod Professor, New York Law School 1999

David, “Symposium: the Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives Delegation and Democracy: a Reply to My Critics,” Cardoza Law Review, 20 Cardozo L. Rev. 731, LexisNexis

The problem that legislators have with the Constitution is that they must take responsibility for both the benefits and costs of new laws. However they vote, they will offend some constituents. Rivals for reelection can easily search the Congressional Record to discover their opponent's voting record. The incumbents do not know in advance which of their votes will come back to haunt them at the next election and therefore have to worry about the wishes of their constituents on every vote. Delegation has allowed legislators to rewrite the ground rules of democracy to help entrench themselves in office. They can pretend to deliver the best of everything to everyone by commanding agencies to promulgate laws to achieve popular statutorily prescribed goals. n54 The statutes are framed so that legislators can skirt the hard choices. This permits legislators to claim much of the credit for the benefits of the laws but shift to the unelected agency officials much of the blame for the inevitable costs and disappointments when the agency fails to deliver all the benefits promised. Come the next election, rival candidates will search the Congressional Record in vain for evidence on where the incumbent stood on the hard choices. Moreover, when some constituents complain that the agency has delivered too few of the benefits promised, and other constituents complain that the agency has imposed too much cost, the incumbent can build electoral support and raise funds by doing casework. Legislators can do casework for both sides in the same regulatory dispute because casework, unlike votes on the floor of Congress, is not publicly recorded. n55 Delegation thus allows members of Congress to function as ministers, who express popular aspirations (through enacting lofty statutory goals) and tend to their flocks (by doing casework), rather than lawmakers who must make hard choices in passing laws. In a book that argues that delegation has enhanced legislators' chances of reelection, Morris Fiorina writes: So long as... congressmen... function principally as national [\*741] policy makers... reasonably close congressional elections will naturally result. For every voter a congressman pleases by a policy stand he will displease someone else. The consequence is a marginal district. But if we have incumbents who deemphasize controversial policy positions and instead place heavy emphasis on nonpartisan, nonprogrammatic constituency service ... the resulting blurring of political friends and enemies is sufficient to shift the district out of the marginal camp. n56 With delegation, legislators can escape being ejected from office except upon grounds that would oust a minister from the pulpit - scandal. In those exceptional cases when incumbents do lose an election, their defeat is far more likely to be caused by some escapade or chicanery than by how they shaped the law. n57 Entrenched encumbency is a marker for what is a profound problem - that legislators have rewritten the ground rules of government to evade responsibility.

**Delegations allows congressional legislators to avoid responsibility and shift blame to agencies**

**Schoenbrod**, David *(*Trustee Professor of Law, New York Law School) **‘99** “DELEGATION AND DEMOCRACY: A REPLY TO MY CRITICS” *CARDOZO LAW REVIEW* [Vol. 20:731 1999] http://www.constitution.org/ad\_state/schoenbrod.htm

C. The Harm to Democracy The problem that legislators have with the Constitution is that they must take responsibility for both the benefits and costs of new laws. However they vote, they will offend some constituents. Rivals for reelection can easily search the Congressional Record to discover their opponent’s voting record. The incumbents do not know in advance which of their votes will come back to haunt them at the next election and therefore have to worry about the wishes of their constituents on every vote.

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With delegation, legislators can escape being ejected from office except upon grounds that would oust a minister from the pulpit — scandal. In those exceptional cases when incumbents do lose an election, their defeat is far more likely to be caused by some escapade or chicanery than by how they shaped the law.[57] Entrenched encumbency is a marker for what is a profound problem — that legislators have rewritten the ground rules of government to evade responsibility.

**Delegation allows Congress to claim only successes, destroys accountability**

**Krent ’94** Harold J. Krent, Professor of Law, Chicago-Kent College of Law; Columbia Law Review “Book Review: Delegation and Its Discontent; March 1994 ” http://www.jstor.org/stable/1123205 ?seq=1 [Schaaf]

Through delegation Congress shirks responsibility for some of the most fundamental political questions affecting our society-for example, how to balance the risk of toxic agents in the workplace against jobs," or how to compare the gravity of drug offenses to espionage activities." Congress has failed to agree upon which military bases to close," and which organizations merit broadcast licenses. 19 Yet members of Congress can claim credit for attempting to solve the problems of the environment and the economy by authorizing agencies to tackle the problems, and then distance themselves from the ensuing regulation if unfavorable to their constituents. Delegation permits legislators to "look good" to their constituents without necessarily providing tangible benefits (pp. 86-87). Congress may too readily distribute rights without imposing commensurate obligations, concealing the tradeoffs that must necessarily follow (p. 9).

# Constitutionality

**Delegation hurts democracy because it’s unconstitutional**

Herrman J.D., University of the Pacific 1997

David, “To Delegate Or Not To Delegate-That Is Preemption: The Lack Of Political Accountability In Administrative Preemption Defies Federalism Constraints On Government Power,” 28 Pac. L.J. 1157, LexisNexis

Congressional ability to delegate powers to agencies is limited both by the Constitution and by inherent democratic principles. n108 Allowing administrative agencies to become lawmakers through rule-making and independent interpretations of congressional statutes weakens the governmental structure of "checks and balances." n109 Administrative agency staffers are unelected and are not politically accountable; therefore, they should not be given unrestrained freedom to formulate policy and law. n110 In addition, the process of approving grants of broad rule-making [\*1171] authority enables Congress to detach itself from unpopular decisions and avoid its own constitutionally mandated accountability. n111 Congress stretches the boundaries of its constitutional duty to make the law when it delegates to agencies. The constitutional foundation of this country embodies the original contract between the American people and the government, which specifically granted lawmaking power to Congress. n112 The Constitution provides for a system of separation of powers, spelling out the role of the legislative, executive, and judiciary. n113 In particular, Article I ordains that "all legislative Powers herein granted shall be vested in a Congress." n114 This specific provision has always been read by the Supreme Court as implicitly providing some limits to the delegation of Congress's lawmaking authority. n115 This limitation principle makes Congress adhere to its role as the governmental body that attempts to provide the most effective and efficient representation of the American people. n116 Failure to follow this constitutionally grounded principle encourages arbitrary policy decisions, and results in congressional delegations of lawmaking power to agencies through broad and often ambiguous statutes. n117 Once an agency without significant political accountability for its decisions has been given broad authority through a congressional delegation, that agency can implement its own policy choices free from significant incentives "to abide by the People's mandate which is to provide reasonable decisions that are in the nation's best interests." n118 When the Framers developed our republican form of government, they were influenced by the wisdom of political theorists. Perhaps the most influential force behind the formation of our republican form of government was John Locke, who articulated one of the important boundaries of legislative authority to be that: [\*1172] The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they who have it, cannot pass it over to others . . . . n119 Following these ideals, the Framers developed a government by which the American people exchanged absolute control over their own affairs, in return for a government composed of elected representatives. n120 Through this system, the people maintained power to control the law and lawmakers who governed them by duly electing the officials. n121 Broad delegations to administrative agencies frustrate this carefully designed system because the lawmaking power is no longer vested in elected officials. n122 Therefore, this type of delegation is weakly rooted in our democratic scheme that promised congressional constituents influence over the laws and lawmakers. n123

# Checks and Ballances

**Delegation undermines checks and balances**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Reviw94 Colum. L. Rev. 710 , March 1994

At some point, congressional **delegation** may well undermine the system of checks and balances immanent in the constitutional scheme. Congressional transfer of Congress' own contempt power n135 to executive officers or **delegation** of the Senate's power to approve treaties n136 to the Secretary of State would compromise the balance of powers in the Constitution. Similarly, if Congress transfers too much of its power to judges, the judiciary's ability to resolve cases and controversies might be compromised. The line that **Schoenbrod** draws between rules and goals represents just one possible way to preserve the constitutional structure, n137 but it is by no means mandated by text or history.

# Oversight

**Subdelegation destroys congressional oversight**

**Stewart 86** – Professor of Administrative Law, Harvard University (Richard, “The Uneasy Constitutional Status of the Administrative Agencies,” April 4, 1986, lexis)[KEZIOS]

Second, and in my view much more likely, Congress would respond by subdelegating the legislation function to congressional committees or subcommittees whose decisions would in most cases be ratified with little or no review by the entire Congress. n42 Because [\*332] the costs of agreement would be lower at the subcommittee level than in Congress as a whole, internal delegation would enable Congress to maintain its legislative output despite the greater specificity required by the courts. If, as Professor Schoenbrod asserts, there is an "iron law of political intervention" in which organized interest groups will inevitably exert an effective demand for government measures which favor their interests, n43 then we should expect that Congress, if faced with stringent judicial enforcement of delegation doctrine, would resort to internal subdelegation in order to meet that demand. Subdelegation, however, creates serious problems of political responsibility. Decisional power is shifted to congressional subcommittee chairmen and staff and their bureaucratic and interest group allies. n44 Policy is made through a submerged micropolitical process without open and regular procedures. The hazards of subdelegation are apparent already in highly detailed tax or environmental regulatory statutes. n45 Although Professor Schoenbrod finds the Clean Air Act insufficiently specific to meet constitutional requirements, n46 the 115 pages that it occupies in the United States Code n47 contain a host of detailed "Christmas Tree" provisions designed to benefit particular regions, industries, and interest groups. n48 Judicial requirements that all regulatory statutes consist of detailed rules of conduct would encourage far broader congressional use of such provisions. In practice, the legislative veto involved precisely the same sort of [\*333] subdelegation to subcommittees. As Harold Bruff and Ernest Gellhorn have demonstrated, such subdelegations produce an invisible faction-dominated decisionmaking process. n49 Enforcing the delegation doctrine in the name of constitutional fundamentalism would thus encourage practices like those invalidated, also in the name of constitutional fundamentalism, by *Chadha.* n50 Accordingly, Professor Lowi's solution to the ills of "interest group liberalism" could have the ironic effect of spreading those ills and entrenching them in statutes. The iron laws of transaction costs make it impossible to achieve adequate political accountability in a system of centralized command and control directives of conduct. Congress must in such a system delegate most of the key decisions. Professor Kenneth Culp Davis was among the first to grasp this fact and argue that delegation to administrative agencies was preferable to subdelegation within Congress, provided that agencies were required to observe procedural and other requirements designed to serve open, responsive, and reasoned decisionmaking. n51 This view was adopted by the courts. n52 Instead of enforcing the constitutional doctrine against legislative delegation, the courts have restructured administrative law to extend procedural rights and judicial review to a wide range of affected interests, create new procedures in rulemaking, and more carefully scrutinize agencies' exercise of discretion. n53 Does internal delegation to congressional subcommittees produce sounder, more responsible government than delegation to agencies backed by hearing requirements and judicial review? Although I doubt that any firm, general conclusions can be reached, there are good grounds for supposing that internal delegation does not on balance lead to more desirable results. Unlike administrative decisionmaking, subdelegated congressional decisionmaking often is not subject to public input through regularly established procedures. It is not required to be based on a public record, and is not subject to "hard look" judicial review. These requirements are not imposed on legislators because of the supposed efficacy of political [\*334] checks. These checks, however, are weakened grievously when decisions are made through congressional subdelegation.

# Political Overload

**Delegation shifts to centralized control and creates political overload**

**Stewart 86** – Professor of Administrative Law, Harvard University (Richard, “The Uneasy Constitutional Status of the Administrative Agencies,” April 4, 1986, lexis)[KEZIOS]

What would happen if the courts adopted such a test? Professor Schoenbrod declines to estimate what percentage of the United States Code his test would invalidate. n26 Those of us seeking to evaluate his proposal must therefore make our best estimates. Again, I find Professor Pierce's analysis entirely persuasive. As he shows, the Schoenbrod test would invalidate most of the federal regulatory statutes now on the books. n27 The result with a sweeping expansion of centralized federal command and control regulation. n32 We have become addicted to federal rules and orders that attempt to minutely prescribe conduct throughout our complexly differentiated society. This addiction has created severe decisionmaking and political overload at the enter. In turn, overload has resulted in a massive transfer of decisional power to federal administrative bureaucracies, provoking calls for vigorous enforcement by the courts of the delegation doctrine in order to restore "juridical democracy." n33 For the past several decades we as a nation have relied increasingly on centralized command and control regulation to achieve national goals of social and economic justice. This reliance has created serious institutional strains. One is peculiar to Congress. Faced with a crowded agenda and relatively high costs of reaching agreement on specific measures, Congress has often delegated the formulation of regulatory commands to federal administrators. Such delegation, however, cannot cure the more general institutional problems involved in reliance on centralized directives to achieve national goals. [\*330] We are a vast, varied, and dynamic nation composed of many diverse institutions, including state and local governments, corporations and labor unions, and a huge variety of nonprofit religious, educational, charitable, social, and advocacy organizations. Central formulation of rules and orders to control in detail conduct within these diverse institutions involves exorbitant information-gathering and decisionmaking costs. n34 These costs are especially severe in the case of the various environmental, health, safety, and antidiscrimination "social" regulatory programs that have arisen during the past two decades. n35 Such programs seek wholesale change throughout the entire society, in contrast to earlier "economic" regulation which was often limited to particular industries such as banking, transportation, or communications. The officials responsible for implementing these comprehensive, centralized programs of command and control regulation have sought to reduce the high costs of making decisions by using rulemaking to adopt relatively crude and uniform prescriptions. Central decision makers would face intolerable burdens if they sought to adjust general commands to the individual circumstances of each actor in each regulated business firm or other organization. n36 Standardized, inflexible prescriptions, however, are bound to be excessively costly, burdensome, impractical, or simply irrational in many particular applications, creating widespread resentment on the part of those regulated. n37 On the other hand, the errors and distortions involved in devising and implementing centralized blueprints and their rapid obsolescence often prevent command and control regulation from delivering the swift and sure changes in conduct promised, creating pervasive "implementation gaps" and corresponding resentment on the part of regulatory beneficiaries. Regulation through centralized directives also creates serious problems of political overload. Under the model of juridical democracy proposed by advocates of the delegation doctrine, n38 Congress itself must formulate the prescriptions governing conduct within [\*331] regulated organizations. The fundamental principle is that government may not coerce citizens except in accordance with legal authority granted through politically responsible processes of representative government. The importance of this principle has been reinforced by impressive evidence, marshalled by Professor Lowi and others, showing that when Congress has delegated to federal administrators the power to make prescriptive rules, parochial economic and ideological factions often dominate the process through which the delegated power was exercised. n39 We no longer accept James Landis' New Deal view that broad delegations to administrative specialists could tap expertise in order to reduce decisionmaking costs and errors without loss of democratic responsiveness and accountability. n40 Using the delegation doctrine to restore "juridical democracy," however, would not solve these problems and could make them worse. The demands on Congress' agenda far exceed its capacity to make collective decisions. Securing agreement by a majority of 435 representatives, a majority of 100 senators, and the President is typically an arduous, time-consuming, and difficult process. This eighteenth century legislative procedure is incapable of responsibly making even the more basic of the myriad decisions entailed by a regulatory strategy of centralized prescription. In these circumstances, vigorous enforcement of delegation doctrine would likely produce one of two outcomes.

# Power Division

**Delegation puts bills in the hands of unelected individuals – causes autocratic legislation**

Schoenbrod Professor, New York Law School 1999

David, “Symposium: the Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives Delegation and Democracy: a Reply to My Critics,” Cardoza Law Review, 20 Cardozo L. Rev. 731, LexisNexis

Schuck argues that delegation could not be that much of a problem because our country is prosperous and our government functions reasonably well compared to governments elsewhere. This is despite delegation, not because of it. The credit for our [\*764] success belongs much more, I think, to other factors such as a free press and checks and balances, both of which are vitiated by delegation. Delegation removes lawmaking from the center stage of politics, that most worthy of press attention. It frees lawmaking from the requirement that both houses of Congress and the President take affirmative responsibility. While the constraints on delegation may avoid the very worst laws that might otherwise come from agencies, to rest content with that and to say there is no problem, as Schuck does, is to miss the bigger picture. Inherent in delegation is a bias towards more regulation, more centralized and complicated regulation, because lawmakers escape most of the blame for launching sweeping regulations that promise more than can be delivered and impose costs for which legislators would not take responsibility if they had to make the hard choice. In other words, society is deprived of the most direct means to decide how much it wants to be controlled by government. Rather, that decision is ceded, in substantial measure, to a government run by legislators who want to entrench themselves in office, agency officials who want to enlarge their budgets, and interest group leaders whose livelihoods and power grow in our thriving administrative state.

# Public Participation

**True Public participation doesn’t occur in agencies, only interest groups influence them for their own self-interests**

**Schoenbrod**, David *(*Trustee Professor of Law, New York Law School) **‘99** “DELEGATION AND DEMOCRACY: A REPLY TO MY CRITICS” *CARDOZO LAW REVIEW* [Vol. 20:731 1999] http://www.constitution.org/ad\_state/schoenbrod.htm

Public participation is also not much of a solace. According to Schuck, “[t]oday, the administrative agency is often the site where public participation in lawmaking is most accessible, most meaningful, and most effective.”[133] But the average member of the public lacks the lawyers and experts needed for meaningful participation. The most average citizens can do is write a letter, whether to an agency or a representative. The letter will probably result in little in either case but is more likely to count when the law is being made by the representative who wants our vote, than the agency official who wants a bigger office. What Schuck really means by public participation is participation by the leadership of various interest groups, be they unions, corporations, and cause-based groups. Interest group leaders do monitor agencies, but usually only on issues of the most direct interest to the leadership. The broadest and most important public interests have little if any representation. To show just how delegation hurts unorganized interests — in fact and not just in theory — was the point of the extended case studies in my book.[134]

**Agencies are influenced by concentrated interests and their independency encourages delegation**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Review94 Colum. L. Rev. 710 , March 1994

In a related argument, **Schoenbrod** debunks the view that the independence of agencies generates social benefits. Although individual agency officials may be protected by civil service laws and do not rely on campaign contributions, agencies as a whole, he argues, are more subject to influence by concentrated interests than members of Congress (pp. 12425). Agencies can be captured, at least in part, by the industries they are to regulate, for those industries have great organizational and resource advantages over the public as a whole. At times, **Schoenbrod** notes, only industry groups participate in agency rule-making (p. 109), and special interest groups enjoy access to agency officials to discuss a wide range of issues (p. 112). Indeed, the apparent independence of agencies makes **delegation** a more attractive option for legislators, because it insulates them from the blame attached to agency policies even when those policies directly result from legislative direction, whether formal or informal. And the independence of agencies from the President also encourages **delegation** because Congress need not fear executive branch hegemony over the delegated authority. n26

**Concentrated interests control the agency’s agenda, not the public**

**Krent**, Harold **’94** (dean and professor of law – cites Schoenbrod, Trustee Professor of Law) “BOOK REVIEW: **DELEGATION** AND ITS DISCONTENTS: POWER WITHOUT RESPONSIBILITY.” - Columbia Law Review94 Colum. L. Rev. 710 , March 1994

Nor do procedures such as notice-and-comment rule-making provide sufficient protection for the public. **Schoenbrod** argues, as have others, n27 that the rule-making process is often a sham because of the lack of widespread participation in, or even knowledge about, agency decision-making (pp. 11112). Concentrated interests control the agency agenda and influence the agency's proposals for change (p. 112). Judicial review under the lenient standard of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. n28 cannot suffice to replace the checks of direct decision-making under Article I of the Constitution (pp. 11314). n29 In the absence of congressional specification of clear rules, judges cannot meaningfully review agency policy choices. [\*718]

# Regulation/Centralization

**Delegations don’t benefit the people’s welfare – instead it increases centralization and regulation**

**Schoenbrod**, David *(*Trustee Professor of Law, New York Law School) **‘99** “DELEGATION AND DEMOCRACY: A REPLY TO MY CRITICS” *CARDOZO LAW REVIEW* [Vol. 20:731 1999] http://www.constitution.org/ad\_state/schoenbrod.htm

Schuck argues that delegation could not be that much of a problem because our country is prosperous and our government functions reasonably well compared to governments elsewhere. This is despite delegation, not because of it. The credit for our success belongs much more, I think, to other factors such as a free press and checks and balances, both of which are vitiated by delegation. Delegation removes lawmaking from the center stage of politics, that most worthy of press attention. It frees lawmaking from the requirement that both houses of Congress and the President take affirmative responsibility.

While the constraints on delegation may avoid the very worst laws that might otherwise come from agencies, to rest content with that and to say there is no problem, as Schuck does, is to miss the bigger picture. Inherent in delegation is a bias towards more regulation, more centralized and complicated regulation, because lawmakers escape most of the blame for launching sweeping regulations that promise more than can be delivered and impose costs for which legislators would not take responsibility if they had to make the hard choice. In other words, society is deprived of the most direct means to decide how much it wants to be controlled by government. Rather, that decision is ceded, in substantial measure, to a government run by legislators who want to entrench themselves in office, agency officials who want to enlarge their budgets, and interest group leaders whose livelihoods and power grow in our thriving administrative state.

The genius of our Constitution was that the people would get to decide how much government they want. If, as Schuck believes, the people’s welfare would be advanced by giving up some of that decisional power, let the people so decide through the constitutional amendment process. Instead, the insiders have done that for them.

**Delegation means less regulation of agencies by congress – this can have dangerous consequences, EPA proves**

**Schoenbrod**, David *(*Trustee Professor of Law, New York Law School) **‘99** “DELEGATION AND DEMOCRACY: A REPLY TO MY CRITICS” *CARDOZO LAW REVIEW* [Vol. 20:731 1999] http://www.constitution.org/ad\_state/schoenbrod.htm

While the problem is often too much regulation, sometimes it is too little regulation. Because legislators also escape blame for the resulting disappointments when agencies fail to deliver on statutory promises, Congress is insensitive to the delay and uncertainty that frequently results when the agency lacks the political muscle needed to make, expeditiously, the hard choices that Congress ducked.[74] What first alerted me to the dangers of delegation was that the Environmental Protection Agency (“EPA”) was years too late in exercising its delegated power to stop the danger posed to young children from leaded gasoline. I am convinced that the national government would have dealt with leaded gasoline as a health hazard years earlier if Congress could not have delegated that responsibility to the EPA in 1970.[75]

**Delegation reduces welfare – blame-shifting**

**Schoenbrod**, David *(*Trustee Professor of Law, New York Law School) **‘99** “DELEGATION AND DEMOCRACY: A REPLY TO MY CRITICS” *CARDOZO LAW REVIEW* [Vol. 20:731 1999] http://www.constitution.org/ad\_state/schoenbrod.htm

Mashaw is also incorrect in dismissing the arguments of Peter Aranson, Ernest Gellhorn, and Glen Robinson that the blame-shifting allowed by delegation reduces welfare.[99] Mashaw writes that their “claim rests on a much more general proposition — that the free play of political life, assuming self-interested constituents and self-interested legislators, makes all legislation disbeneficial (or most of it anyway).”[100] He goes on to dispute the more general proposition. Let us say that Mashaw is correct. Suppose that bills with a prospect of passage are evenly split between those that produce more benefits than costs and those that produce more costs than benefits. Even under this supposition, Aranson, Gellhorn, and Robinson are correct in their claim that the blame-shifting allowed by delegation reduces welfare. After all, the blame-shifting skews the political incentives faced by legislators, desensitizing them to the blame they deserve for costs they indirectly impose and the benefits they indirectly withhold by consigning laws needed now to the limbo of agency rulemaking.

Whether delegation enhances or reduces welfare depends upon a number of other factors such as agency expertise, differences in the politics of agency and legislative lawmaking, differences in agency and legislative procedures, judicial review, and others. I have stated at length elsewhere why I think that, on balance, delegation does more harm to welfare than good.[101] Mashaw’s book is unresponsive to my arguments about delegation and welfare. It would be pointless to repeat my arguments here.

# AT People don’t read Bills

**It’s not about the bill but the debate in Congress – they attract news coverage and representatives can be held accountable**

Schoenbrod Professor, New York Law School 1999

David, “Symposium: the Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives Delegation and Democracy: a Reply to My Critics,” Cardoza Law Review, 20 Cardozo L. Rev. 731, LexisNexis, HC

The Clean Air Act that Schoenbrod uses as an example for his view as easily supports mine. There are indeed some critical gaps in this statute and its many amendments that leave substantial policy discretion to administrators. On the other hand, the statute goes on for hundreds of pages, many of them containing hypertechnical provisions that few citizens could possibly understand. Moreover, to the extent that the Clean Air Act and its amendments do things that dramatically depart from citizens' expectations, I would suggest that they are largely in the detailed provisions, not the broad aspirational sections. Voters do not read bills and would have little chance of understanding most of them if they did. Hence, legislators can selectively convey information about legislation whether they legislate specifically or generally. n61 While Mashaw and I agree on much, I still think he is profoundly wrong. For starters, he conflates whether the statute is specific or general with whether the statute states the law or delegates. n62 As Mashaw himself points out, the Clean Air Act delegates lawmaking authority in the most exhaustingly specific terms. In contrast, the one section of the 1970 Clean Air Act that actually stated the law - the provision requiring new car makers to reduce emissions of three specified pollutants by ninety percent - is comparatively simple in its basic concept. n63 It is not the detail [\*744] for which the legislators are responsible, but rather the law enacted. When Congress enacts a law, it must take responsibility not only for the benefits promised, but also for the duties imposed. But when Congress delegates, its fingerprints are not left on the duties imposed on the public, and the more detail included in the delegation, the easier it is for legislators to obscure their responsibility for the eventual costs and disappointments. n64 My book contains two extended case studies, one being the Clean Air Act, which show precisely how legislators use delegation and the related phenomenon of casework to give voters an impression of their ideology that differs from how they actually exercise their power. n65 Mashaw argues that statutes that do not delegate will not make legislators accountable because voters do not read statutes. Thus, legislators can characterize their actions as they choose. n66 Mashaw is both right and wrong. It is true that voters do not read statutes, and bully for them. Mashaw is wrong anyway because the fulcrum of legislative responsibility is not the statute, but the floor fight. With delegation, the floor fight is avoided because almost all legislators can vote for a bill that calls for clean air and jobs too. That is why the 1970 Clean Air Act passed almost unanimously. n67 [\*745] Without delegation, the bill would have to contain clauses like, "widget plants shall emit no more than X pounds of sulfur per ton of widgets produced." Such a clause is open to an amendment to delete it from the bill or substitute "Y pounds" for "X pounds." Legislators have to stand up and be held accountable on the hard choices. That is why one of the only contested provisions of the 1970 Clean Air Act was on the amendments to the one true law in the statute - limiting emissions from new cars by ninety percent. n68 Floor fights are newsworthy and attract public interest. The local papers will point out how the local representatives voted. By the next election, legislators will have made many controversial choices. They will be known for how they act on hard choices and not just for what they say.

# AT Voters Check Delegation

**Public influence on Agencies in miniscule compared to influence on Representatives**

Schoenbrod Professor, New York Law School 1999

David, “Symposium: the Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives Delegation and Democracy: a Reply to My Critics,” Cardoza Law Review, 20 Cardozo L. Rev. 731, LexisNexis

Schuck also suggests that agencies use their delegated powers well. He does so by taking me to task for writing in the initial draft of my paper that agencies are free "to do as they please." n130 I did write in discussing those occasions where Congress might "trim the agency's power ... [that] so long as the agency does not profoundly anger large numbers of voters - and instead only slightly irritates large numbers of voters or really screws much smaller numbers - it is free to do as it pleases." n131 I was rebutting the ar [\*763] gument that the power of Congress to repeal the agency rule or cut back its delegated powers works to reconcile delegation with democracy. Schuck has taken my unfortunately hyperbolic language, literally and out of context, to be a claim that agencies are unrestrained. This I do not believe, as is clear from my book where I discuss multiple constraints on agency action and the problem of agency paralysis. n132 That the agencies are constrained does not necessarily make what they produce good. None of the sources of constraint that Schuck invokes can rightly be claimed to filter out bad laws and force imposition of good ones. Congress and the White House are at their least accountable in the many open, and not so open, ways that they lean on agencies engaged in making laws. The courts cannot demand that agencies produce good laws, they can only require superficially plausible reasons for the laws that agencies do produce. Public participation is also not much of a solace. According to Schuck, "today, the administrative agency is often the site where public participation in lawmaking is most accessible, most meaningful, and most effective." n133 But the average member of the public lacks the lawyers and experts needed for meaningful participation. The most average citizens can do is write a letter, whether to an agency or a representative. The letter will probably result in little in either case but is more likely to count when the law is being made by the representative who wants our vote, than the agency official who wants a bigger office. What Schuck really means by public participation is participation by the leadership of various interest groups, be they unions, corporations, and cause-based groups. Interest group leaders do monitor agencies, but usually only on issues of the most direct interest to the leadership. The broadest and most important public interests have little if any representation. To show just how delegation hurts unorganized interests - in fact and not just in theory - was the point of the extended case studies in my book. n134

**Delegation lets legislators to act against constituent’s wishes**

Schoenbrod Professor, New York Law School 1999

David, “Symposium: the Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives Delegation and Democracy: a Reply to My Critics,” Cardoza Law Review, 20 Cardozo L. Rev. 731, LexisNexis, HC

Even if Mashaw were somehow correct in asserting that dele [\*747] gation does not hinder voters in picking legislators with similar ideologies, he is wrong in thinking that there is no loss of democracy. In the democracy that is our birthright under the Constitution, voters are not consigned to picking representatives in the hope that their representatives' ideologies will lead them to act in the future as we want. Rather, we can punish legislators who we think voted unwisely by removing them from office at the next election. But with delegation, legislators can distance themselves from much of the blame that results from making decisions on new laws. Even though legislators may personally share our ideological preferences, political incentives lead them to delegate in ways that do not produce laws that coincide with our views. For example, because they escape much of the blame for the inevitable costs of creating new federal lawmaking programs and also much of the blame for the inevitable failure of these programs to produce the benefits promised, legislators are skewed towards creating and enlarging an agency's lawmaking jurisdiction, making its goals more ambitious, its methods more intrusive, and its procedures more complicated. The upshot is that, in lawmaking, the national government, particularly the executive branch, increasingly takes jurisdiction over matters that might otherwise be left to the political branches of state or local government, the common law, or private ordering. While the problem is often too much regulation, sometimes it is too little regulation. Because legislators also escape blame for the resulting disappointments when agencies fail to deliver on statutory promises, Congress is insensitive to the delay and uncertainty that frequently results when the agency lacks the political muscle needed to make, expeditiously, the hard choices that Congress ducked. n74 What first alerted me to the dangers of delegation was that the Environmental Protection Agency ("EPA") was years too late in exercising its delegated power to stop the danger posed to young children from leaded gasoline. I am convinced that the national government would have dealt with leaded gasoline as a health hazard years earlier if Congress could not have delegated that responsibility to the EPA in 1970. n75 In sum, even if voters could correctly discern incumbents' ideologies in the sense that Mashaw means (for example, "pro [\*748] business" or "pro-labor"), delegation skews legislators' political incentives in ways that favor the national class over ordinary voters. Favoring insiders over outsiders is different than favoring left over right; remember, Standard Oil was a big proponent of the New Deal's National Recovery Act. n76

**Most voters do not evaluate delegation/non-delegation as a criteria for election**

Schoenbrod Professor, New York Law School 1999

David, “Symposium: the Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives Delegation and Democracy: a Reply to My Critics,” Cardoza Law Review, 20 Cardozo L. Rev. 731, LexisNexis, HC

Mashaw's allocation of responsibility is wrong-headed on many levels. It is not as if voters get to choose between candidates who delegate and those who do not. When the Republicans in Congress think environmental regulation is too aggressive, they do not replace the Clean Air Act with a regulatory regime in which Congress takes responsibility or even use the Congressional Review Act to challenge regulations such as the new ambient air quality standards for ozone and particulate matter. Instead, they introduce legislation that would delegate in ways that would make it harder to regulate strictly. Indeed, the Washington Post took exception to a recent Republican environmental bill on the basis that [\*749] the way for Congress to change the EPA's priorities is to stop delegating and start taking some responsibility. n78 That will not happen readily, however, because delegation gives the electoral advantage to those who duck the hard choices. As I said before, delegation is not so much an issue of left versus right as insiders versus outsiders. With insiders having such a significant stake in delegation, outsiders opposed to delegation face a tremendous organizational challenge. Moreover, it is hard to get ordinary voters to focus on the issue. It is human nature to care more about what a particular piece of legislation does to one directly rather than whether the process by which the legislation is passed will do indirect harm by undermining democracy in the long run. Even law students have to be hit on the head by us professors to get them to look beyond the direct consequences in cases about the structure of government and see the long-term stakes. Ordinary voters are apt to care more whether a particular bill seems to help them than whether it delegates. For example, even in 1970 when there was a public outcry against Congress because it had dropped the ball on air pollution by delegating broadly to agencies and Congress promised explicitly that it would make the "hard choices," Congress easily got away with delegating again. The 1970 statute camouflaged its delegation with the kind of spurious detail that even an expert such as Jerry Mashaw confuses with nondelegation. n79 Despite these organizational and informational obstacles, the political effort to stop delegation has gained ground in recent years. Presently, more than seventy representatives and thirteen senators support a bill to end delegation and alternative bills also have substantial support. n80 But if this effort does not succeed, and it may well not, it does not mean that the voters have had fair representation on this issue. Voters would be represented more fairly if delegation were addressed as the constitutional issue that it is. In 1935 after the Supreme Court decided the cases striking down instances of delegation, President Roosevelt considered seeking amendments to the Constitution to authorize delegation but decided to maintain a "studied silence" on amending the Constitution during the 1936 [\*750] presidential election and refrained from initiating the amendment process afterwards for fear of losing Democratic congressmen during the 1938 election. In the end, he decided to either pack or intimidate the Court rather than present the delegation issue to the public. n81 The Court's "change in time that saved nine" was not, in Bruce Ackerman's term, "a constitutional moment," but rather a constitutional stupor brought on for the convenience of those in power in all three branches of the federal government. n82 It is in order to guard against such self-dealing that the Constitution requires that the states be involved in the constitutional amendment process. n83 Few people who, unlike professors, are not paid to study and opine upon the structure of government have the time, knowledge, and inclination to do the work that Mashaw says voters need to do to claim their democratic birthright. They must read all the grist in order to guess candidates' ideologies and then wage a meta-political campaign to get legislators to assume responsibility for the hard choices. Like Henry Higgins in My Fair Lady who sings, "Why can't a woman be more like a man," n84 Mashaw argues, "Why can't ordinary voters be more like me?" Because they are not, for delegation still means "power to the insiders."

# \*\*\*Internals:

# Public Participation is key

**Public participation key to policymaking – focus and accountability are magnified**

Peter H. **Schuck**, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 19**99**

(“Delegation and Democracy” – Cardozo Law Review), http://www.constitution.org/ad\_state/schuck.htm [Stolarski]

Finally, the agency is often the site in which public participation is most effective. This is not only because the details of the regulatory impacts are hammered out there. It is also because the agency is where the public can best educate the government about the true nature of the problem that Congress has tried to address. Only the interested parties, reacting to specific agency proposals for rules or other actions, possess (or have the incentives to ac-quire) the information necessary to identify, explicate, quantify, and evaluate the real-world consequences of these and alternative proposals. Even when Congress can identify the first-order effects of the laws that it enacts, these direct impacts seldom exhaust the laws’ policy consequences. Indeed, first-order effects of policies usually are less significant than the aggregate of more remote effects that ripple through a complex, interrelated, opaque society. When policies fail, it is usually not because the congressional purpose was misunderstood. More commonly, they fail because Congress did not fully appreciate how the details of policy implementation would confound its purpose. Often, however, this knowledge can only be gained through active public participation in the policymaking process at the agency level where these implementation issues are most clearly focused and the stakes in their correct resolution are highest.

# \*\*\*A2: WE DON’T LINK TO PTIX

# Generic Agencies Link

**Presidential blame means they hide unpopular policies through delegation – other concerns trump public response to delegation**

Schoenbrod Professor, New York Law School 1999

David, “Symposium: the Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives Delegation and Democracy: a Reply to My Critics,” Cardoza Law Review, 20 Cardozo L. Rev. 731, LexisNexis, HC

Mashaw also argues in a section entitled "Accountability in a Presidential System" that "the flexibility that is currently built into the processes of administrative governance by relatively broad delegations of statutory authority permits a more appropriate degree of administrative, or administration, responsiveness to the voter's will than would a strict nondelegation doctrine." n85 Notice that Mashaw talks about "responsiveness" not responsibility. In other words, he claims that the administration will give voters what they want, not that it will be more meaningfully ac [\*751] countable for what it does. This is government "for the people," not government "by the people." n86 Mashaw is correct to refrain from claiming that the President is meaningfully accountable to the voters for the laws promulgated by appointees. With delegation, the public loses the right to have both its elected representatives and its elected President take personal responsibility for the law. In exchange, it gets the right to have someone appointed by an elected President take responsibility. The President is not as accountable for agency laws as members of Congress are for enacted laws. The President, who does not have to publicly sign off on agency laws, may deny responsibility for them. Moreover, the Framers included the requirement that bills be presented to the President not out of any sense that the President was more accountable than Congress, but rather because the President was less accountable to particular interest groups and thus more inclined to protect liberty. n87 A President has less reason than a member of Congress to worry that a position taken on a particular law will affect reelection prospects. The President's responsibility for any one law is, after all, diluted by the electorate's concern about a host of other issues involving, for example, national defense, foreign affairs, and law enforcement.

**Agencies will act under the radar to avoid blame**

Schoenbrod Professor, New York Law School 1999

David, “Symposium: the Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives Delegation and Democracy: a Reply to My Critics,” Cardoza Law Review, 20 Cardozo L. Rev. 731, LexisNexis

[\*752] Why does Mashaw think that an administration that is democratically accountable to the voters in only a very diluted sense would be more responsive to the voters' wishes? He does not explain why the administration should be responsive at all but implicitly assumes that it will be so. Unspoken, but still there, is the old national class conceit that experts, if left to their devices, will act in the public interest. So, yes, Virginia, there is a Santa Claus, but it is worth considering why Saint Nick, the agency administrator, will pay much attention to the voters' desires other than to prevent the President from losing the next election, assuming it is still the first term. One possibility is that Saint Nick does not want to stir up public opinion to such an extent that Congress will trim the agency's power. This might explain why the EPA under Presidents Ford and Carter did not use its power to make Los Angeles cut gasoline supplies by eighty percent to meet Clean Air Act deadlines and why the EPA under President Reagan did not scrap the regulations that were slowly reducing the lead content of gasoline. n89 So long as the agency does not profoundly anger large numbers of voters, and instead only slightly irritates large numbers of voters or badly harms only smaller numbers, it need not fear that Congress will take away its power.

# Laundry List

**Legislative delegation does not always overcome congressional gridlock – Multiple reasons**

**Krent ’94** Harold J. Krent, Professor of Law, Chicago-Kent College of Law; Columbia Law Review “Book Review: Delegation and Its Discontent; March 1994 ” http://www.jstor.org/stable/1123205 ?seq=1 [Schaaf]

Schoenbrod acknowledges that delegation can at times overcome legislative gridlock (p. 121). When there is no agreement within Congress over the policy to be adopted, members of Congress may agree instead to delegate that issue to an agency. But in the long run, he argues, such benefit is illusory. Impasse can exist at the agency level as well, or the agency may delay action in light of the absence of any consensus (pp. 121-22). Indeed, the procedural requirements confronting agencies may frustrate speedy resolution of the policy issues." Schoenbrod recounts the Environmental Protection Agency's (EPA) experience under the Clean Air Act to make his point (pp, 79-80), and much the same story can be told about NHTSA's episodic encouragement of passive restraint systems in automobiles." In addition, delays may arise because agency rules are more difficult to enforce than laws. Businesses may refuse to comply with agency directives and seek judicial review, or they may circumvent the new requirement by pressuring influential members of Congress to alter the recently promulgated mle (p. 122). Agency rules may also lack the authoritative force attributed to congressional enactments-Congress has more legitimacy in the eyes of the public, and its laws of general applicability engender more respect than the case-specific determinations (smokestack by smokestack) of agency officials (p. 122). In any event, legislative gridlock may at times be public-regarding if the momentum for change stems from lobbying by special interest groups. B

# Expensive Bills

**Delegation links to politics for expensive bills – blame reversion and blame displacement**

Christopher **Hood,** Gladstone Professor of Government and Fellow of All Souls College Oxford, **2003**

“The Risk Game and the Blame Game”, Government and Opposition, Academician of the Academy of Learned Societies of the Social Sciences. Fellow of the National Academy of Public Administration, 4/10/03, http://onlinelibrary.wiley.com/doi/10.1111/1477-7053.00085/pdf

Thus the delegation strategy reaches its limits when voter blame for adverse events does not ref lect formal lines of responsibility. There are at least two ways in which voter blame over malign outcomes may revert to politician ‘blame shifters’, in spite of delegation, leading to cell (4) in Table 2. One is blame reversion, or failure to deflect blame by delegation. In such cases voters treat formal delegation like tax inspectors looking at arrangements deliberately designed to avoid tax. 35 Blame reversion has often been identified in US presidential ‘lightning rod’ studies, but the conditions leading to it seem obscure. It would seem plausible to argue that institutional structures are linked to the likelihood of blame reversion, but contradictory claims have been made on this point. Weaver36 follows Woodrow Wilson in arguing that blame avoidance through delegation is likely to be less credible in parliamentary than presidential regimes, but Harold Laski 37 made exactly the opposite claim, arguing that greater personalization of power made blame harder to dissipate away from presidents. Other institutional features that may affect the credibility of delegation include the ease with which that delegation can be revoked — for instance, delegation to law courts, independent inquiries or other elected actors is likely to be harder to revoke than delegation to quasi-independent bodies. In cell (4), voters can also respond to delegation by blame displacement. That means **increased propensity to blame politicians for their personal and ‘inalienable’ shortcomings and failures (for instance, financial,** sexual or other misjudgements and personal indiscretions). If delegation arrangements are credible, forestalling blame reversion, but voters are ‘vindictive’, they may respond to blame-shifting strategies by blame displacement. However, clear examples of blame displacement are not easy to find. It is not clear whether or how far the apparently rising concern with political ‘sleaze’ in the post-cold war 1990s38 is part of a ‘blame displacement’ public response to politician strategies of blame avoidance by policy automaticity or delegation to experts, managers, regulators or independent providers.

# Lobbying

**Delegation leads to lobbying – forces capital spending.**Eric **Posner** Professor of Law, University of Chicago **AND** Adrian **Vermuele,** Professor of Law, University of Chicago **2002**

“Interring the Nondelegation Doctrine”, 69 U. Chi. L. Rev., http://heinonline.org/HOL/Page?handle=hein.journals/uclr69&div=57&g\_sent=1&collection=journals , [Stolarski]

This argument remains valid even if we accept the assumption that Congress really does not want much authority because then it has to make difficult decisions about to whom it should make transfers, when it would rather accumulate political goodwill by engaging in constituent service.' Thus, Congress delegates authority to agencies without monitoring them, in effect holding a "regulatory lottery," in the words of Aranson and his coauthors.9 The problem with this theory is that interest groups and constituents who pick the wrong ticket in the regulatory lottery will lobby Congress to reverse the agency's decisions, and indeed even to retract the delegation. Those who benefit from the agency decisions will lobby Congress to maintain the status quo.93 Congress will have to answer the hard question of whether to interfere with its agency, and so it cannot divest itself of the responsibility for making difficult decisions. Indeed, both the winners and the losers will realize ex ante that the delegation might benefit or harm them, and so they will lobby ex ante about the delegation as vigorously as they would about any other kind of legislation.

# Timing

**Agencies link – they can time their decisions strategically to reduce blame**

Jacob E. **Gersen**, University of Chicago Law School **AND** Anne Josesph **O'Connell**, University of California, Berkeley School of Law, **2008**

American Law & Economics – Association Annual Meetings, “The Timing of Regulation”, http://law.bepress.com/cgi/viewcontent.cgi?article=2608&context=alea&sei-redir=1#search=%22blame%22, [Stolarski]

Additionally, overseers may at times, incur blame for their actions. Voters might punish monitors they perceive as unduly interfering with the administrative process. The likelihood of blame, however, arguably depends more on the structure and content of agency action than the form of oversight. The core insight is that timing decisions that reduce the visibility of policy increase the costs of monitoring. That is, agencies can utilize timing to make it more costly for overseers to observe agency behavior. As these costs rise, monitoring will tend to be less effective. The relevant principal or overseer will have to expend greater resources to ensure that agencies implement desirable policies that are consistent with the principal‘s preferences.

# A2: ‘Arrow’s Theorem’/Congress gets stuck

**This is nonsense – Congress does not work like that**

Schoenbrod Professor, New York Law School 1999

David, “Symposium: the Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives Delegation and Democracy: a Reply to My Critics,” Cardoza Law Review, 20 Cardozo L. Rev. 731, LexisNexis

Mashaw has a second and final reason for claiming that the administration is more responsive - Arrow's Theorem. Arrow's Theorem states that, under certain conditions, democratic choices cannot be stable. An explanation of the theorem goes as follows: Assume that three children - Alice, Bobby, and Cindy - have been pestering their parents for a pet. The parents agree that the children may vote to have a dog, a parrot, or a cat. Suppose each child's order of preference is as follows: Alice - dog, parrot, cat; Bobby - parrot, cat, dog; Cindy - cat, dog, parrot. In this situation, if pairwise voting is required, then majority voting cannot pick a pet. n94 A majority (Alice and Cindy) will vote for a dog rather than a [\*754] parrot; a majority (Alice and Bobby) will vote for a parrot rather than a cat; and a majority (Bobby and Cindy) will vote for a cat rather than a dog. n95 In these rather peculiar circumstances, a majority will never reach a stable conclusion. Relying on Arrow's Theorem, Mashaw concludes that "delegating choice to administrators is but another way of avoiding voting cycles through the establishment of dictators." n96 "Dictators" is, as I have been arguing, not that far from the right word. While Arrow's Theorem may give Alice, Bobby, and Cindy a reason to delegate to their parents the choice of their pet, it does not give Congress a plausible excuse to delegate to agencies the task of making law. Empirical research has shown that Congress is not prey to the kind of voting cycles that plague these hypothetical children. Moreover, the assumptions upon which Arrow premised his theorem do not hold true in the United States Congress. For example, Arrow's Theorem assumes that voters' preferences are not arrayed along some continuum, but rather are topsy-turvy, like those of Alice, Bobby, and Cindy. However, studies show that preferences within Congress tend to be arrayed along a liberal-conservative continuum. n97

# \*\*\*THEORY:

# PIC’s Good

**They Have To Defend The Whole Plan – That includes the part of the plan we PIC’d out of.**

**Every CP Is A PIC – Because they must include all or part of the plan.**

**Their Choice – They chose the topic for the debate. They should defend it.**

**Reciprocal – A permutation including all of the plan and part of the CP is legitimate even though it is partially inclusive of the CP.**

**No Implication – Not my fault they worded their plan badly, worst case you reject the CP, not the team.**

# Agent CP’s Good

**Best Policy Option – We further the search for the best option by presenting alternative agents.**

**Increases Education – We learn about agent issues, which are key to learning about policy implementation.**

**Real World – Federal Agencies vie for control over policies. If the courts rule on an issue, the Congress won’t pass a bill to address the same thing.**

**No Voter – Just a reason to reject the CP, not the team.**

The crux of policymaking education is found in agency and implementation issues – focus should be applied on resolving those issues

Peter H. Schuck, Professor, Yale Law School, and Visiting Professor, New York Law School, Spring 1999 (“Delegation and Democracy” – Cardozo Law Review) http://www.constitution.org/ad\_state/schuck.htm

God and the devil are in the details of policymaking, as they are in most other important things—and the details are to be found at the agency level. This would remain true, moreover, even if the nondelegation doctrine were revived and statutes were written with somewhat greater specificity, for many of the most significant impacts on members of the public would still be indeterminate until the agency grappled with and defined them. Finally, the agency is often the site in which public participation is most effective. This is not only because the details of the regulatory impacts are hammered out there. It is also because the agency is where the public can best educate the government about the true nature of the problem that Congress has tried to address. Only the interested parties, reacting to specific agency proposals for rules or other actions, possess (or have the incentives to ac-quire) the information necessary to identify, explicate, quantify, and evaluate the real-world consequences of these and alternative proposals. Even when Congress can identify the first-order effects of the laws that it enacts, these direct impacts seldom exhaust the laws’ policy consequences. Indeed, first-order effects of policies usually are less significant than the aggregate of more remote effects that ripple through a complex, interrelated, opaque society. When policies fail, it is usually not because the congressional purpose was misunderstood. More commonly, they fail because Congress did not fully appreciate how the details of policy implementation would confound its purpose. Often, however, this knowledge can only be gained through active public participation in the policymaking process at the agency level where these implementation issues are most clearly focused and the stakes in their correct resolution are highest.

The distinctions drawn by our counterplan are not trivial – they constitute fundamental and pervasive consequences of policymaking

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Understanding how such pervasive consequences flow from a seemingly technical change in the lawmaking process requires defining the fine but fundamental difference between a statute that makes law and one that delegates. According to the Oxford English Dictionary, a law is "a rule of conduct imposed by authority"; therefore, a statute makes law when it states a rule of conduct. For example, a statute that prohibits power plants from emitting pollution above a certain rate or that prohibits orange growers from shipping more than a certain pro-portion of their crop makes law, because the statute itself defines what conduct is illegal. In contrast, a statute delegates when it empowers an agency to state the rules governing such emissions or shipments, even if the statute instructs the agency in some detail about what goals to achieve or what procedures to follow in making the rules. Even though all statutory laws require some interpretation, statutes that state laws differ in a critical way from statutes that delegate. In making laws, Congress has to allocate both rights and duties in the very course of stating what conduct it prohibits, and so must make manifest the benefits and costs of regulation.

# \*\*\*DEMOCRACY GOOD

# Climate Change

**Democracies solve climate change – political will and empirics**

Battig PhD and Bernauer Prof 2009

Michele, PhD studies in the field of international climate protection at ETH Zurich , Thomas, professor of political science at ETH Zurich, “National Institutions and Global Public Goods: Are Democracies More Cooperative in Climate Change Policy?,” International Organization, 63, HC

The recent international relations literature tends to side with the first assumption. Several authors have argued that democracies have stronger domestic enforcement mechanisms than nondemocracies, and that their decisions to engage in international commitments will thus be more closely aligned with policy outcomes.73 Von Stein hypothesizes that “democracies … are more likely to keep their international promises—in large part because they only make promises they know they can keep.”74 The approach taken in this article, which uses a unified analytical framework to study policy output, outcome, and gaps between the two, helps in testing this claim without narrowing the focus to legally binding obligations and formal compliance. Hence it is more in line with the recent literature on the effectiveness of international regimes, which conceptualizes effectiveness primarily in terms of problem solving rather than legal compliance.75 In using self-selected political commitment levels rather than formal treaty obligations as the benchmark, it also avoids the “constrain or screen” problem inherent in studies focusing on formal treaty commitments and compliance.76 In contrast to empirical results on (positive) democracy effects on compliance in the human rights and monetary policy area,77 our analysis shows that democracy is associated with a bigger implementation gap in climate change policy. This contrasting evidence appears quite worrying from a normative perspective. The remainder of this section thus concentrates on its policy implications. In climate change policy, democracies have obviously had a slow start in moving from commitments to emission reductions. This should not come as a great surprise. Climate change is a much more complex challenge than most local or regional environmental degradation issues, such as air and water pollution. It is also characterized by a global free-rider problem. However, there are signs that more democratic countries are likely to perform better over the long run in policy outcome terms as well. As argued in the theory section of this article, public and interest group demand for climate change mitigation is likely to be stronger in democracies than in nondemocracies. The available empirical evidence in fact suggests that public concern over climate change risks tends to be higher in democracies, independently of income. This is also true of environmental NGO activity.78 Moreover, democracies tend to have higher income levels, and the available data shows that the environmental Kuznets curve for GHG emissions has already reached a turning point in most of the rich and democratic countries. Democracies are, independently of income, also more active in environmental monitoring and research and development79—this increases knowledge about risks and generates new technologies that are more energy efficient. Democracies also tend to perform better in terms of sustainable development more broadly defined (for example, as measured in the form of the World Bank's Index of Adjusted Net Savings and the Center for International Earth Science Information Network's Environmental Performance Index).80 It is hard to see why this pattern should not extend to global environmental problems, such as climate change, at least in the long run. The evidence presented in this article is largely congruent with this argument. In combination with the assumption that democratic institutions are more likely to motivate policymakers to supply policies that meet public and interest group demand for climate change mitigation, these findings leave considerable room for optimism.

# Conflict

**Democracies don’t have wars with each other**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard University http://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

2. Empirical Criticisms

a. Democracies Sometimes Fight

The Argument: Critics of the democratic peace point to apparent wars between democracies as evidence that there is no democratic peace. They frequently cite the War of 1812, the Spanish-American War, Finland''s decision to align with Germany against the Western powers and the Soviet Union during World War Two, the American Civil War, World War One, and the wars that followed the disintegration of Yugoslavia in the 1990s. At least 17 conflicts have been cited as potential wars between democracies.**93**

Responses: There are three reasons to reject the claim that the democratic peace proposition is invalid because democracies may have fought some wars. First, the democratic peace proposition correctly formulated-holds that democracies rarely fight, not that they never fight. In social science it is probably impossible to generate laws with 100% accuracy. Thus the correct formulation of the democratic peace proposition is the statement that democracies almost never go to war with one another.**94**

Second, many of the cases cited do not qualify as "wars" between "democracies." A closer examination of the conflicts in question reveals that the apparent exceptions do not refute the democratic peace proposition. In some cases, one of the participants was not a democracy. In 1812, Britain was not a democracy. Spain''s democratic credentials in 1898 were dubious. Germany in 1914 was not governed by liberal principles and its foreign policy was directed by the Kaiser, not the elected Reichstag.**95** In other cases, no international war took place. The American Civil War was not an international war. Finland engaged in virtually no direct hostilities with the Western allies during World War Two; it fought almost entirely against communist Russia.**96**

Third, the criticism that democracies have fought one another is irrelevant to deciding whether the United States should export democracy. The spread of democracy makes sense as long as democracies are significantly less likely to go to war with one another. A policy of spreading democracy would be justified if democracies have, for example, avoided war 99.9% of the time; we can decide to spread democracy without debating whether the figure is 99.9% or 100%.

**Democracy reduces likelihood for war**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard University http://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

B. Democracy is Good for the International System

In addition to improving the lives of individual citizens in new democracies, the spread of democracy will benefit the international system by reducing the likelihood of war. Democracies do not wage war on other democracies. This absence-or near absence, depending on the definitions of "war" and "democracy" used-has been called "one of the strongest nontrivial and nontautological generalizations that can be made about international relations."**51** One scholar argues that "the absence of war between democracies comes as close as anything we have to an empirical law in international relations."**52** If the number of democracies in the international system continues to grow, the number of potential conflicts that might escalate to war will diminish. Although wars between democracies and nondemocracies would persist in the short run, in the long run an international system composed of democracies would be a peaceful world. At the very least, adding to the number of democracies would gradually enlarge the democratic "zone of peace."

**We have a moral obligation to spread democracy – key to prevent violence and instability**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard Universityhttp://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

A. Democracy is Good for the Citizens of New Democracies

The United States should attempt to spread democracy because people generally live better lives under democratic governments. Compared to inhabitants of nondemocracies, citizens of democracies enjoy greater individual liberty, political stability, freedom from governmental violence, enhanced quality of life, and a much lower risk of suffering a famine. Skeptics will immediately ask: Why should the United States attempt to improve the lives of non-Americans? Shouldn''t this country focus on its own problems and interests? There are at least three answers to these questions.

First, as human beings, **American should and do feel some obligation to improve the well-being of other human beings**. The bonds of common humanity do not stop at the borders of the United States.**19** To be sure, these bonds and obligations are limited by the competitive nature of the international system. In a world where the use of force remains possible, no government can afford to pursue a foreign policy based on altruism. The human race is not about to embrace a cosmopolitan moral vision in which borders and national identities become irrelevant. But there are many possibilities for action motivated by concern for individuals in other countries. In the United States, continued public concern over human rights in other countries, as well as governmental and nongovernmental efforts to relieve hunger, poverty, and suffering overseas, suggest that Americans accept some bonds of common humanity and feel some obligations to foreigners. The emergence of the so-called "CNN Effect"-the tendency for Americans to be aroused to action by television images of suffering people overseas-is further evidence that cosmopolitan ethical sentiments exist. If Americans care about improving the lives of the citizens of other countries, then the case for promoting democracy grows stronger to the extent that promoting democracy is an effective means to achieve this end.

**Democracies less likely to use violence against own people – empirically proven**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard Universityhttp://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

2. Liberal Democracies are Less Likely to Use Violence Against Their Own People.

Second, America should spread liberal democracy because the citizens of liberal democracies are less likely to suffer violent death in civil unrest or at the hands of their governments.**27** These two findings are supported by many studies, but particularly by the work of R.J. Rummel. Rummel finds that democracies-by which he means liberal democracies-between 1900 and 1987 saw only 0.14% of their populations (on average) die annually in internal violence. The corresponding figure for authoritarian regimes was 0.59% and for totalitarian regimes 1.48%.**28** Rummel also finds that citizens of liberal democracies are far less likely to die at the hands of their governments. Totalitarian and authoritarian regimes have been responsible for the overwhelming majority of genocides and mass murders of civilians in the twentieth century. The states that have killed millions of their citizens all have been authoritarian or totalitarian: the Soviet Union, the People''s Republic of China, Nazi Germany, Nationalist China, Imperial Japan, and Cambodia under the Khmer Rouge. Democracies have virtually never massacred their own citizens on a large scale, although they have killed foreign civilians during wartime. The American and British bombing campaigns against Germany and Japan, U.S. atrocities in Vietnam, massacres of Filipinos during the guerrilla war that followed U.S. colonization of the Philippines after 1898, and French killings of Algerians during the Algerian War are some prominent examples.**29**

There are two reasons for the relative absence of civil violence in democracies: (1) Democratic political systems-especially those of liberal democracies constrain the power of governments, reducing their ability to commit mass murders of their own populations. As Rummel concludes, "Power kills, absolute power kills absolutely ... The more freely a political elite can control the power of the state apparatus, the more thoroughly it can repress and murder its subjects."**30** (2) Democratic polities allow opposition to be expressed openly and have regular processes for the peaceful transfer of power. If all participants in the political process remain committed to democratic principles, critics of the government need not stage violent revolutions and governments will not use violence to repress opponents.**31**

**Studies show that autocratic nations are more likely to go to war while democratization decreases likelihood**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard University http://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

The argument that democratization causes war does not directly challenge the usual form of the democratic peace proposition. Mansfield and Snyder recognize that "It is probably true that a world where more countries were mature, stable democracies would be safer and preferable for the United States."**114** Instead, the arguments suggests that attempts to spread democracy have significant risks, including the risk of war.

Responses: Mansfield and Snyder have advanced an important new argument, but even if partially true, it does not refute the case for spreading democracy internationally. Taken to extremes, the Mansfield/Snyder argument would amount to a case for opposing all political change on the grounds that it might cause instability. Promoting democracy makes more sense than this course, because the risks of democratization are not so high and uncontrollable that we should give up on attempts to spread democracy.

First, there are reasons to doubt the strength of the relationship between democratization and war. Other quantitative studies challenge the statistical significance of Mansfield and Snyder''s results, suggest that there is an even stronger connection between movements toward autocracy and the onset of war, find that it is actually unstable transitions and reversals of democratization that increase the probability of war, and argue that democratization diminishes the likelihood of militarized international disputes.**115** In particular, autocracies are likely to exploit nationalism and manipulate public opinion to launch diversionary wars-the same causal mechanisms that Mansfield and Snyder claim are at work in democratizing states. Mansfield and Snyder themselves point out that "reversals of democratization are nearly as risky as democratization itself," thereby bolstering the case for assisting the consolidation of new democracies.**116** In addition, very few of the most recent additions to the ranks of democracies have engaged in wars. In Central and Eastern Europe, for example, Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia have avoided major internal and external conflicts. Of these countries, only Slovenia was involved in brief series of military skirmishes with Serbia.**117** Russia has been involved in a number of small wars on or near its borders, but so far it has undergone a dramatic transition toward democracy without becoming very warlike.**118** There is little evidence of international war in Latin America, which also has witnessed a large-scale transition to democracy in recent years. Countries such as Mongolia and South Africa appear to have made the transition to democracy without going to war. The new democracies plagued by the most violence, including some former Soviet republics and the republics of the former Yugoslavia, are those that are the least democratic and may not qualify as democracies at all.

# Growth

**Democracy key to the sustainable, long term economic growth**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard Universityhttp://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

3. Democracy Enhances Long-Run Economic Performance

A third reason for promoting democracy is that democracies tend to enjoy greater prosperity over long periods of time. As democracy spreads, more individuals are likely to enjoy greater economic benefits. Democracy does not necessarily usher in prosperity, although some observers claim that "a close correlation with prosperity" is one of the "overwhelming advantages" of democracy.**32** Some democracies, including India and the Philippines, have languished economically, at least until the last few years. Others are among the most prosperous societies on earth. Nevertheless, over the long haul democracies generally prosper. As Mancur Olson points out: "It is no accident that the countries that have reached the highest level of economic performance across generations are all stable democracies."**33**

Authoritarian regimes often compile impressive short-run economic records. For several decades, the Soviet Union''s annual growth in gross national product (GNP) exceeded that of the United States, leading Soviet Premier Nikita Khrushchev to pronounce "we will bury you." China has posted double-digit annual GNP increases in recent years. But **autocratic countries rarely can sustain these rates of growth for long**. As Mancur Olson notes, "experience shows that relatively poor countries can grow extraordinarily rapidly when they have a strong dictator who happens to have unusually good economic policies, such growth lasts only for the ruling span of one or two dictators."**34** The Soviet Union was unable to sustain its rapid growth; its economic failings ultimately caused the country to disintegrate in the throes of political and economic turmoil. Most experts doubt that China will continue its rapid economic expansion. Economist Jagdish Bhagwati argues that "no one can maintain these growth rates in the long term. Sooner or later China will have to rejoin the human race."**35** Some observers predict that the stresses of high rates of economic growth will cause political fragmentation in China.

# US Interests

**Democracy protects U.S Security**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard University http://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

2. Why there is a Democratic Peace: The Causal Logic

1. Democracies Will Not Go to War with the United States

First, democracies will not go to war against the United States, provided, of course, that the United States remains a democracy. The logic of the democratic peace suggests that the United States will have fewer enemies in a world of more democracies. If democracies virtually never go to war with one another, no democracy will wage war against the United States. Democracies are unlikely to get into crises or militarized disputes with the United States. Promoting democracy may usher in a more peaceful world; it also will enhance the national security of the United States by eliminating potential military threats. The United States would be more secure if Russia, China, and at least some countries in the Arab and Islamic worlds became stable democracies.

**The interdependency of the international sphere makes democracy promotion vital for the U.S’s interests**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard Universityhttp://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

Third, improvements in the lives of individuals in other countries matter to Americans because the United States cannot insulate itself from the world. It may be a clichÃ© to say that the world is becoming more interdependent, but it is undeniable that changes in communications technologies, trade flows, and the environment have opened borders and created a more interconnected world. These trends give the United States a greater stake in the fate of other societies, because widespread misery abroad may create political turmoil, economic instability, refugee flows, and environmental damage that will affect Americans. As I argue below in my discussion of how promoting democracy serves U.S. interests, the spread of democracy will directly advance the national interests of the United States. The growing interconnectedness of international relations means that the United States also has an indirect stake in the well-being of those in other countries, because developments overseas can have unpredictable consequences for the United States.

For these three reasons, at least, Americans should care about how the spread of democracy can improve the lives of people in other countries.

# Famine

**Democracy prevents famines – gov is accountable for populations and leaders have electoral incentive to prevent starvation**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard University http://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

4. Democracies Never Have Famines

Fourth, the United States should spread democracy because the citizens of democracies do not suffer from famines. The economist Amartya Sen concludes that "one of the remarkable facts in the terrible history of famine is that no substantial famine has ever occurred in a country with a democratic form of government and a relatively free press."**43** This striking empirical regularity has been overshadowed by the apparent existence of a "democratic peace" (see below), but it provides a powerful argument for promoting democracy. Although this claim has been most closely identified with Sen, other scholars who have studied famines and hunger reach similar conclusions. Joseph Collins, for example, argues that: "Wherever political rights for all citizens truly flourish, people will see to it that, in due course, they share in control over economic resources vital to their survival. Lasting food security thus requires real and sustained democracy."**44** Most of the countries that have experienced severe famines in recent decades have been among the world''s least democratic: the Soviet Union (Ukraine in the early 1930s), China, Ethiopia, Somalia, Cambodia and Sudan. Throughout history, famines have occurred in many different types of countries, but never in a democracy.

Democracies do not experience famines for two reasons. First, in democracies governments are accountable to their populations and their leaders have electoral incentives to prevent mass starvation. The need to be reelected impels politicians to ensure that their people do not starve. As Sen points out, "the plight of famine victims is easy to politicize" and "the effectiveness of democracy in the prevention of famine has tended to depend on the politicization of the plight of famine victims, through the process of public discussion, which generates political solidarity."**45** On the other hand, authoritarian and totalitarian regimes are not accountable to the public; they are less likely to pay a political price for failing to prevent famines. Moreover, authoritarian and totalitarian rulers often have political incentives to use famine as a means of exterminating their domestic opponents.

**Democracy prevents famine - early warning systems**

**Lynn-Jones, Sean (**Editor, International Security; Series Editor, Belfer Center Studies in International Security) **’98 "Why the United States Should Spread Democracy" March 1998** Discussion Paper 98-07, Center for Science and International Affairs, Harvard University http://belfercenter.ksg.harvard.edu/publication/2830/why\_the\_united\_states\_should\_spread\_democracy.html

Second, the existence of a free press and the free flow of information in democracies prevents famine by serving as an early warning system on the effects of natural catastrophes such as floods and droughts that may cause food scarcities. A free press that criticizes government policies also can publicize the true level of food stocks and reveal problems of distribution that might cause famines even when food is plentiful.**46** Inadequate information has contributed to several famines. During the 1958-61 famine in China that killed 20-30 million people, the Chinese authorities overestimated the country''s grain reserves by 100 million metric tons. This disaster later led Mao Zedong to concede that "Without democracy, you have no understanding of what is happening down below."**47** The 1974 Bangladesh famine also could have been avoided if the government had had better information. The food supply was high, but floods, unemployment, and panic made it harder for those in need to obtain food.**48**

The two factors that prevent famines in democracies-electoral incentives and the free flow of information-are likely to be present even in democracies that do not have a liberal political culture. These factors exist when leaders face periodic elections and when the press is free to report information that might embarrass the government. A full-fledged liberal democracy with guarantees of civil liberties, a relatively free economic market, and an independent judiciary might be even less likely to suffer famines, but it appears that the rudiments of electoral democracy will suffice to prevent famines.

# AT K of Democracy

**Policy relevant action is necessary to change states**

Geis, PhD, 2011

Anna, Research Fellow at the Peace Research Institute, “Between the Theory and Practice of Democratic Peace,” International Relations 2011 25: 147, http://ire.sagepub.com/content/25/2/147.full.pdf

While I advocate enhanced critical and self-reflexive work on DP, the consequence would probably be a loss of impact on practical politics. Policymakers are usually not interested in complex musings on the bright and dark sides of the Enlightenment. What they need are clear recommendations for policies. So we finally reach another fundamental tension here: if you have optimistic messages, you will be heard, but might find yourself associated with political developments you cannot support. If you have ambivalent findings and caution for self-reflexivity, you might end up as the typical critics in the ivory towers of academia.

\*\*\*Democracy Bad

# Imperialism

Democracy leads to imperialism

**Global Research ’06** “Exporting the American Model: Markets and Democracy” - http://www.globalresearch.ca/index.php?context=va&aid=2392

There is something absurd and inherently false about one country trying to impose its system of government or its economic institutions on another. Such an enterprise amounts to a dictionary definition of imperialism. When what's at issue is "democracy," you have the fallacy of using the end to justify the means (making war on those to be democratized), and in the process the leaders of the missionary country are invariably infected with the sins of hubris, racism, and arrogance.

We Americans have long been guilty of these crimes. On the eve of our entry into World War I, William Jennings Bryan, President Woodrow Wilson's first secretary of state, described the United States as "the supreme moral factor in the world's progress and the accepted arbiter of the world's disputes." If there is one historical generalization that the passage of time has validated, it is that the world could not help being better off if the American president had not believed such nonsense and if the United States had minded its own business in the war between the British and German empires. We might well have avoided Nazism, the Bolshevik Revolution, and another thirty to forty years of the exploitation of India, Indonesia, Indochina, Algeria, Korea, the Philippines, Malaya, and virtually all of Africa by European, American, and Japanese imperialists.

We Americans have never outgrown the narcissistic notion that the rest of the world wants (or should want) to emulate us. In Iraq, bringing democracy became the default excuse for our warmongers -- it would be perfectly plausible to call them "crusaders," if Osama bin Laden had not already appropriated the term -- once the Bush lies about Iraq's alleged nuclear, chemical, and biological threats and its support for al Qaeda melted away. Bush and his neocon supporters have prattled on endlessly about how "the world is hearing the voice of freedom from the center of the Middle East," but the reality is much closer to what Noam Chomsky dubbed "deterring democracy" in a notable 1992 book of that name. We have done everything in our power to see that the Iraqis did not get a "free and fair election," one in which the Shia majority could come to power and ally Iraq with Iran. As Noah Feldman, the Coalition Provisional Authority's law advisor, put it in November 2003, "If you move too fast the wrong people could get elected."

# Discrimination

**Democracy marginalizes minorities**

**Sociology Research Online ’06** “WHY DEMOCRACY IS WRONG” http://web.inter.nl.net/users/Paul.Treanor/democracy.html

averted. Option C is no extra taxes and no aid. When the votes are counted, 100% of the voters have chosen Option C. After all, who wants to pay more taxes?

So 90 million people starve. Yet all electoral procedures on both islands are free and fair, the media are free, political campaigning is free, there is no political repression of any kind. According to democratic theory, *any* outcome of this democratic process must be respected. Two perfect democracies have functioned perfectly: if you believe the supporters of democracy, that is morally admirable. But it clearly is not: there is something fundamentally wrong with democracy, if it allows this outcome.

The defect is not hard to find: the people most affected by the decision are excluded from voting. The issue is the composition of the demos, the decision-making unit in a democracy: it is a recurrent theme in the ethics of democracy. Democratic theory can legitimise a political community in the form of an island of prosperity, and then legitimise the selfish decisions of that community. This theoretical possibility corresponds with the real-world western democracies. Millions of people *are* dying of hunger and preventable disease, yet the electorate in rich democracies will not accept mass transfers of wealth to poorer countries. They will not accept mass immigration from those countries either. A causal relationship has developed at global level, between democracy in the rich countries, and excess mortality elsewhere (famine, epidemics, endemic diseases).

This is not the only such problem with democracy. Despite its quasi-sacred status, democracy has many ethical defects which are either evident in practice, or easily illustrated by hypothetical examples.

The treatment of minorities is perhaps the most recognised defect of democracies. Between the mid-1930's and the mid-1970's, the Swedish government forcibly sterilised thousands of women, because of 'mental defects', or simply because they were of 'mixed race'. Yet Sweden has been a model democracy for the entire period. The democracy worked: the problem is that democracy offers no protection to marginalised and despised minorities. The usual answer of democrats is that excesses can be prevented by constitutionally enforced individual rights. There are two problems with that.

First, no constitutional rights are absolute: President Bush showed how easy it is to overturn fundamental constitutional protections. Simply by redefining some American citizens as 'illegal enemy combatants', he was able to intern them. Some groups are in any case openly excluded from the usual democratic rights, most notably illegal immigrants (more on this later). The Australian government detains asylum seekers in internment camps in the desert: its hard line accurately reflects the attitudes of a racist electorate. The detainees can't vote, can't engage in political activities, and have no free press, but Australia is still considered a democracy.

The second problem is that basic rights allow wide limits. Treatment of minorities may be harsh and humiliating, without infringing their rights. A recent example in the Netherlands is a proposal to impose compulsory genital inspections for ethnic minorities. The aim is to combat female genital mutilation, but every ethnic Somali parent, regardless of their own circumstances, would be obliged to present their daughters for annual genital inspection. Eritreans, Egyptian and Sudanese might be included under the legal obligation, even if they were naturalised Dutch citizens. The proposal has majority support in Parliament. It is not law yet, but since Somali's are a marginalised and often despised minority in the Netherlands, there is nothing they can do to prevent its implementation.

So long as they avoid certain types of policy, and outright violence, democracy allows a democratic majority to impose its will on a minority. They can impose their language and a culture, and both impositions are normal practice in nation states. They can also impose their values, which may be unacceptable to the minority: the best example is democratic prohibitions of alcohol or drugs. Alcohol prohibition in the United States, enforced through a constitutional amendment, was a direct result of democracy. Since there was (and is) no 'right to drink', the Christian anti-alcohol majority could simply use the democratic process, to make their values the national values. 'Prohibition' was repealed in 1933, but the 'War on Drugs' of the last 20 years is at least as comprehensive in terms of policy and effects. Successful prohibition movements are a special case of the inherent anti-minority bias in democracies.

# AT Democratic Peace Theory

## Democratic Peace Theory false – liberal hegemons

Smith, Prof, 2011

Tony, professor of political science at Tufts University, “Between the Theory and Practice of Democratic Peace,” International Relations 2011 25: 147, http://ire.sagepub.com/content/25/2/147.full.pdf)

Yet despite these brave assertions, the failings of DPT theoretically, and the dangers it could precipitate practically should it be taken too seriously by policymakers, have been evident since its beginnings. Analytically, DPT neglected to consider the critical importance of the existence of a liberal hegemon (or prime mover, or Leviathan) to the creation, protection and expansion of what liberals often styled ‘the zone of democratic peace’ – ‘the pacific union’ hypothesized to exist among market democracies. The result in descriptive terms was to make what might be called a ‘magnetic attraction’ explain the interactive character of these peoples rather than a discipline maintained by a market democratic liberal Leviathan pursuing its national interests. The regrettable policymaking consequences of this alleged ‘law’ of world affairs could be seen in the triumphal self-righteousness of the leadership in Washington before 2003, which announced it would transform ‘the Broader Middle East’ by democratizing it once the invasion of Iraq was successfully concluded. While it was certainly the case that some of those, such as Michael Doyle, who had given birth to DPT warned leaders against taking on quixotic crusades based on the concept, the nest of theoretical and practical constructs that made up the perspective was so stimulating intellectually, so attractive practically, that most liberals were tempted to ignore these wise counsels. 2

## DPT false – doesn’t deter selfish policymaking

Smith, Prof, 2011

Tony, professor of political science at Tufts University, “Between the Theory and Practice of Democratic Peace,” International Relations 2011 25: 147, http://ire.sagepub.com/content/25/2/147.full.pdf)

The reasons for this obviously flawed analysis are evident in reading Andrew Moravcsik’s explanation of what liberalism (or any other construct of the logic of world affairs) requires for it to be possessed of a coherent and powerful theoretical base. To put it summarily, to be worthy of being called a theory a group of concepts must be demonstrated to be congruently reinforcing, empirically valid, and uniquely insightful. DPT passes muster. The logic it posits for the behavior of democratic governments, integrated economies and multilateral institutions is indeed synergistically coherent; several studies have empirically validated the peace among democracies; and the special attention this line of reasoning draws to the character of democratic states and coalitions provides important tools of historical understanding. Should a liberal Leviathan be introduced into the equation, however, the conceptual congruence would not be self-contained (to repeat, hegemonic leadership is a Realist variable), and liberalism as a theory would not be terribly impressive, but instead could be reduced to being no more than a variant of Realism. Seen from this perspective, the kind of speculation that John Rawls indulged in concerning the possibility of creating a ‘realistic utopia’ in 1999 – conjectures on his part based, astonishingly enough, completely on DPT – would necessarily have to be judged as having clay feet theoretically. This conceptual flaw at the heart of DPT nonetheless contributed to its attractiveness as a focus of policy for the simple reason that it promised a world order of stable peace if eventually market democracies controlled international politics, without necessarily making reference to the role of the United States in such an undertaking. Thus a utopian illusion worked to blind many liberals to the self-interested actions taken by Washington to increase its power in global affairs after 1991 by persuading them that whatever was good for the United States was also good for world order. Here the repeated assertions of President Woodrow Wilson between 1913 and 1921 that the United States was ‘disinterested’ in the positions it took for settling the world’s conflicts could receive pseudo-scientific verification.

## DPT false – empirics – trade explains better

Smith, Prof, 2011

Tony, professor of political science at Tufts University, “Between the Theory and Practice of Democratic Peace,” International Relations 2011 25: 147, http://ire.sagepub.com/content/25/2/147.full.pdf)

How persuasive today is DPT? The reversals the United States experienced in the aftermath of the invasion of Iraq in March 2003, and the quagmire developing in Afghanistan after 2009, might alone not have been enough to cast serious doubt among the true believers as to the bona fides of DPT. For to some these wars remained justified, however badly bungled they had been; in better hands their goals might have been attained and could still. Moreover, Iraq did not prove DPT to be wrong so much as it showed that arguments about the ease of a democratic transition were quite mistaken. Proponents of a Wilsonian agenda could simply point out, therefore, that they had never said that the world’s democratization would be an easy business, only that if it succeeded global peace would follow. As a result, whatever the objection of skeptics who might dwell on the flaws in the reasoning of DPT and the way they camouflaged the self-interest of American power, this set of ideas could remain inviolate to those still possessed of its terms. In these circumstances, the breakdown of the American economy in late 2008, followed by the terrible economic crises in the European Union beginning a year later, revealed even more clearly than the Iraq War the intellectual shallowness and political danger of taking DPT too uncritically to heart. For an integral part of the liberal argument since its inception was that open, integrated markets would promote not only general prosperity but also democratic government and peace among peoples. However, the breakdown of the ‘Washington Consensus’, holding that economic privatization, deregulation and openness served the interests of all who participated in the process, demonstrated that not enough sovereignty had been pooled, not enough political guidance had been formulated, for the zone of democratic peace to maintain its stability and its unity. In economics as in politics, the failures of the liberal Leviathan mattered fundamentally. By the end of 2010, with Afghanistan added to Iraq as a military setback, and with the liberal underpinnings of the world economic order in serious doubt (the structure of the EU and the strength of the American government relative to corporate interests both in question, a rise in state regulation, ownership and protectionism possible) – and these debacles almost exclusively the fault of policies promoted by the United States – the entire edifice of a liberal world was in question. Between 2003 and 2010 the Americansponsored liberal order that had brought low Soviet communism in 1991 appeared effectively to have engineered its own self-destruction. Yet, given the economic and political interests now sewn together by a heavy fabric of arguments, values and institutions, liberalism continued to hold sway. Would the free market democracies find the wisdom and resolve to bind their wounds and work together to move beyond a decade of woes and rebuff those who talked of the decline of the West? Much depended on how the liberal Leviathan managed the strength it still possessed to deal with challenges that were very much of its own making. The promise of DPT may have been betrayed in practice, but the question nonetheless remained of its ability to reformulate its basic premises on the basis of a clearer understanding of how its objectives should be pursued and so move forward for the common good.

## DPT studies false – ignore negative aspects and presume rationality

Geis, PhD, 2011

Anna, Research Fellow at the Peace Research Institute, “Between the Theory and Practice of Democratic Peace,” International Relations 2011 25: 147, http://ire.sagepub.com/content/25/2/147.full.pdf

To be sure, non-experts cannot know about the many branches of DP research or the details of still enduring and unsolved debates on why democratic states actually keep peace with one another, but even common sense could tell all those who only highlight the good news about democracies that these regimes also have a ‘dark side’. 10 The more powerful democracies have a distinct record of warfighting and they possess unique military capabilities. Democracies are per se not immune to exclusionary discourses and practices towards internal or external ‘others’, and they are not safe from suffering a loss of civil liberties and political rights. The bulk of DP research itself delivers elements of a liberal story of progress that downplays such aspects. Furthermore, there are two problematic points of many DP studies: first, their certainty about democratic peace as a ‘fact’ and, second, their belief in the superior rationality of democratic actors, institutions and politics. First: democratic peace is often identified as a ‘fact’ in DP studies as well as in the broader liberal discourse. This echoes the famous statement by Jack Levy that the dyadic DP finding was the closest approximation to an empirical ‘law’ to be found in social science, 11 but develops it even further. Stating the empirical finding in terms of a fact veils the historically contingent nature of democracy as a widely admired regime type and betrays a certainty about future human action that is not warranted at all. If the idea of ‘history’ and the contingent nature of politics have any meaning, then there can be no certainties now or ever. As the current political narrative on the ‘return of the authoritarian great powers’ makes clear, an ‘end of history’ marked by the irreversible triumph of the ideas of liberal democracy has not come. 12 Second: Notable parts of DP scholarship usually adhere to an idealized notion of the ‘nature’ of liberal-democratic polities as highly rational. The underlying narrative of such accounts often contains one or more of the following assumptions: democracies are founded on principles, processes and norms which promise to realize a maximum of rationality in politics. Democratic citizens are rational and reasonable; their leadership is constrained by numerous constitutional safeguards. Democratic policymaking is transparent and pluralist. Liberal democracies are reliable partners because they are bound by law and capable of credible, costly signaling. Mature democracies are committed to norms of peaceful conflict resolution, fairness and participation, and they will externalize such norms wherever they can trust the counterpart to adhere to the same norms and values. Democracies possess a greater military effectiveness. To be sure, there are crucial differences in the methodological underpinnings of DP research: scholars adopting a rational choice perspective such as, paradigmatically, Bruce Bueno de Mesquita, only model actors as if these were risk-averse, rational utility maximizers, and they do not discriminate against non-democratic actors as being less rational, only as being less constrained by institutions and structures. 13 Democratic polities provide different incentives and constraints than non-democracies. However, there are a considerable number of DP scholars, Bruce Russett included, who embrace a more normative perspective on liberal-democratic politics. Such scholars tend to perceiv liberal-democratic polities, institutions and actors as driven by a higher rationality and reasonableness, or they combine institutional and normative explanatory models, which result in analytical observations and normative convictions merging. Keeping in mind these differences between approaches to studying DP, the charge of idealizing democracies seems only directed towards a part of DP scholarship: all authors who advance a rather benign, progressive liberal narrative of superior rationality and augmented peace would appear to cover all the problematic sides of democracies and liberalism, exclusionary discourses and practices, and lack of ‘reasonableness’ of actors. However, those scholars who construct parsimonious rational choice models also bear their share of responsibility for the problems of DP research: they cannot be charged with their work suffering a normative overload, but by their inevitable abstractions they create the misplaced illusion of ahistorical ‘facts’ and ‘laws’, ignoring all contingency of human action. In sum, as long as many DP scholars continue to abstain from embedding their ever more sophisticated research designs within a more reflexive and self-critical framework, they will remain vulnerable to the charge of serving as ‘handmaidens of power’ – whether wittingly or not.

**Democratic peace theory’s false – unreliable research**

Errol **Henderson**, Assistant Professor, Dept. of Political Science at the University of Florida, 20**02**

“Democracy and War The End of an Illusion?” Lynne Rienner Publishing Inc., [Stolarski]

To my mind, the empirical evidence in support of both the dyadic and the nomadic DPP is problematic for several reasons. The most recent studies alluded to earlier, which indicate that democracies are less likely to fight each other and are more peaceful, in general, than non-democracies, are beset by research design problems that severely hinder their reliability (e.g., Oneal and Russett, 1997; Oneal and Ray, 1997; Russett and Oneal, 2001). For example, many of them rely on a questionable operationalization of joint democracy that conflates the level of democracy of two states with their political dissimilarity. Only by teasing out the effects of each factor are we in a position to confi­dently argue that shared democracy, rather than other factors, is actually the motivating force driving democratic states toward their alleged­ly more peaceful international relations. In addition, the findings used to support monadic DPP claims also rely on questionable research designs that exclude whole categories of international war—namely, extrastate wars, which are usually imperialist and colonial wars. The exclusion of these wars from recent tests of the DPP leaves us unable to determine the actual applicability of the DPP to the full range of international war. In addition, given that some scholars suggest that the DPP is applicable to civil wars (Krain and Myers, 1997; Rummel, 1997), it is important to determine to what extent we observe a “domes­tic democratic peace” for the most civil war prone states—the post­colonial, or third world, states. Previous work has not tested the DPP for this specific group of states, and it is important that our research design address this omission.

**Democratization doesn’t stop war – recent studies**

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“Democracy and War The End of an Illusion?” Lynne Rienner Publishing Inc., [Stolarski]

Are Democracies Less Likely to Fight Each Other? The replication and extension of Oneal and Russett (1997), which is one of the most important studies on the DPP, showed that democracies are not significantly less likely to fight each other. The results demon­strate that Oneal and Russett’s (1997) findings in support of the DPP are not robust and that joint democracy does not reduce the probability of international conflict for pairs of states during the postwar era. Simple and straightforward modifications of Oneal and Russett’s (1997) research design generated these dramatically contradictory results. Specifically, by teasing out the separate impact of democracy and political distance (or political dissimilarity) and by not coding cases of ongoing disputes as new cases of conflict, it became clear that there is no significant relationship between joint democracy and the likelihood of international war or militarized interstate dispute (MID) for states during the postwar era. These findings suggest that the post—Cold War strategy of “democratic enlargement,” which is aimed at ensuring peace by enlarging the community of democratic states, is quite a thin reed on which to rest a state’s foreign policy—much less the hope for international peace.

**Democratic peace theory is flawed – democracies start more wars**

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“Democracy and War The End of an Illusion?” Lynne Rienner Publishing Inc., [Stolarski]

In this chapter, I summarize the main findings of the study and briefly discuss their research and policy implications. The main finding resulting from the statistical analyses is that democracy is not significantly associated with a decreased likelihood of internation­al wars, militarized disputes, or civil wars in postcolonial states. There does not appear to be a dyadic democratic peace or a monadic one. To the extent that a democratic peace obtains, it does for extrastate wars, which are more than likely relics of a bygone era; nevertheless, even for these wars, while democracies in general are less likely to become involved in them, Western states—especially Western democracies— are more likely to fight them. These findings result from analyses using straightforward research designs, similar data, and identical sta­tistical techniques as those found in research supporting the DPP. They suggest that politico-economic factors in the postwar era greatly con­tributed to the phenomenon that is erroneously labeled the “democrat­ic peace.” Further, they imply that foreign policy strategies aimed at increasing the likelihood of peace in the future by spreading democra­cy are likely to be ineffective, at best, or conflict exacerbating, at worst.

**Democracies still attack non-democracies**

Errol **Henderson**, Assistant Professor, Dept. of Political Science at the University of Florida, 20**02**

“Democracy and War The End of an Illusion?” Lynne Rienner Publishing Inc., [Stolarski]

Are Democracies More Peaceful than Nondemocracies with Respect to Interstate Wars? The results indicate that democracies are more war-prone than non-democracies (whether democracy is coded dichotomously or continu­ously) and that democracies are more likely to initiate interstate wars. The findings are obtained from analyses that control for a host of political, economic, and cultural factors that have been implicated in the onset of interstate war, and focus explicitly on state level factors instead of simply inferring state level processes from dyadic level observations as was done in earlier studies (e.g., Oneal and Russett, 1997; Oneal and Ray, 1997). The results imply that democratic enlargement is more likely to increase the probability of war for states since democracies are more likely to become involved in—and to ini­tiate—interstate wars.

**Democratic transitions lead to civil wars**

Errol **Henderson**, Assistant Professor, Dept. of Political Science at the University of Florida, 20**02**

“Democracy and War The End of an Illusion?” Lynne Rienner Publishing Inc., [Stolarski]

Are Democracies in the Postcolonial World Less Likely to Experience Civil Wars? The results fail to support the democratic peace for civil wars in post-colonial states since democracy is not significantly associated with a decreased probability of intrastate war in postcolonial states. Instead, the results corroborate previous findings that semidemocracy is associ­ated with an increased likelihood of civil war. Therefore, although coherent democracy does not appear to reduce the likelihood of post­colonial civil wars, partial democracy exacerbates the tensions that result in civil war. Given the findings from Chapter 6, these results sug­gest that democratic enlargement as a strategy for peace is not likely to succeed for those states that need it most—the postcolonial, or third world, states. Further, even if full-fledged democracy were to engender peace within these states—which is not indicated by the findings reported here—it would likely generate conflict, internationally, since democracies are more prone to initiate and become involved in inter­state wars and militarized disputes. As noted earlier, the promise of egalitarianism, which is the true appeal of democracy, seems to involve a Hobson’s choice for citizens of postcolonial states: equality with an increased likelihood of domestic instability or inequality with a decreased likelihood of international stability.

# AT Democracy Solves Environment

## Democracies don’t help the environment – growth determines it

Scruggs Prof 2010

Lyle, Assistant Professor of Political Science at the University of Connecticut, “Democracy and Environmental Protection:

An Empirical Analysis,” http://www.sp.uconn.edu/~scruggs/mpsa09e.pdf

Over the years, there have been a surprisingly large number of studies that have examined, in one way or another, the effect of democratic institutions on environmental policy. However, most of these studies have not done a very good job of evaluating the evidence in light of prevailing explanations. Our paper has attempted to correct some of these. The results indicate that there is not much evidence to support the impact of democracy on overall national environmental performance. Whether one examines individual indicators of environmental progress, or a conglomeration of them, we find almost no evidence to suggest that democratic countries, particularly the long-established democracies that the theoretical literature suggests are most likely to perform better, do, in fact, perform better. These “non-results” hold for both unconditional and conditional (i.e., controlling for other factors) performance. The results do suggest that economics is the dominant driver of performance in the period we are examining. The more sanguine view of democracy expressed past research can be traced to several problems. First, previous cross-national work may have ignored outliers and distributional anomalies in their pollution variables that undermine conventional tests of parameter significance. Second, most previous estimates have looked at the recent levels of pollution in democracies vis-à-vis non-democracies, not at progress in reducing environmental stresses. Our results suggest that the effects of democracy are likely due to the fact that most good performing democracies are rich, and wealth is what matters most. Third, previous work has often estimated the effects of democracy as if they were simultaneous, which seems highly implausible. Actual explanations of the way that democracy works hinge on the idea that democratic institutions are the long-standing rules of the game. Democracies work rather slowly. Fourth, and intimately tied to the previous point, recent research has implicitly given democracy the credit for the environmental improvements in Eastern Europe following the collapse of the Soviet Union. While a number of post-Communist countries became democracies, it is hard to sustain the argument that this coincidence was primarily the result of popular demands for environmental protection. Among other things, these countries experienced contemporaneous economic liberalization and restructuring brought on by the creation of market economies that were as much or more responsible for those changes. Once we control for the unique features of this geo-political anomaly, we cannot sustain the claim that democracy, or democratization improvements environmental performance.