

Online Appendices

Appendix A

Relevant Theoretical Studies

Here are examples of prominent, influential books and articles from both political science and law that begin by assuming that a legislature begins by deciding whether a law should delegate to an agency or should not delegate. The purpose of this list, which is partial and is not meant to be either definitive or exhaustive, is to show how common this assumption is in theoretical assessments of delegation. Because many of these authors or teams of authors have published multiple articles and books about delegation that rely on this assumption, and because this list is illustrative and not meant to be complete, we have listed only the most prominent example for each (e.g., we list Fiorina 1982 but not his other related studies).

Table A1

Theoretical studies that begin by allowing the legislature to choose not to delegate

- Bawn, Kathleen. 1995. "Political control versus expertise: Congressional choices about administrative procedures." *American Political Science Review* 89(1): 62-73.
- Bendor, Jonathan, and Adam Meirowitz. 2004. "Spatial models of delegation." *American Political Science Review* 98(2): 293-310.
- Epstein, David, and Sharyn O'Halloran. 1999. *Delegating Powers*. NY: Cambridge.
- Fiorina, Morris P. 1982. "Legislative choice of regulatory forms: Legal process or administrative process?" *Public Choice* 39(1):33-66.
- Gailmard, Sean. "Discretion rather than rules: Choice of instruments to control bureaucratic policy making." *Political Analysis* 17(1): 25-44.
- Huber, John D., and Nolan McCarty. "Bureaucratic capacity, delegation, and political reform." *American Political Science Review* 98(3): 481-494.
- Huber, John D., and Charles R. Shipan. 2002. *Deliberate Discretion?* New York: Cambridge University Press.
- Lemos, Margaret H. 2010. "The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII." 63 *Vanderbilt Law Review* 363.
- Martin, Elizabeth M. 1997. "An informational theory of the legislative veto." *The Journal of Law, Economics, and Organization* 13(2): 319-343.
- Stephenson, Matthew C. 2005. "Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts." *Harvard Law Review* 119:1035-1070.
- Voigt, Stefan and Eli M. Salzburger 2002. "Choosing Not To Choose: When Politicians Choose to Delegate Powers." *Kyklos* 55(2):289-310.
- Volden, Craig. 2002. "A Formal Model of the Politics of Delegation in a Separation of Powers System." *American Journal of Political Science* 46(1): 111-133.
- Wiseman, Alan E. 2009. "Delegation and Positive-Sum Bureaucracies" *The Journal of Politics* 71(3): 998-1014.

Appendix B

The Public Health Cigarette Smoking Act

In 1970 Congress passed the Public Health Cigarette Smoking Act. This law, which passed despite enormous opposition from both the tobacco industry and the broadcasting industry (Whiteside 1970), was a major victory for public health advocates, as it strengthened the relatively weak restrictions on advertising the Congress had initially passed right after the 1964 Surgeon General report on the dangers of smoking. Both at the time and since, it has come to be seen as a landmark law in the area of public health.

Despite its prominence, the law itself is extremely short, consisting of less than three full pages (see <http://uscode.house.gov/statutes/pl/91/222.pdf>). Even that overstates the length of the law, as much of its text consists of definitions, statements of intent, and language preventing states from subverting this law. Rather, the entire policy content of the law is spelled out in three sentences that appear in two brief paragraphs, one addressing warning labels and the other advertising:

- Section 4: “It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: 'Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health'. Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.”
- Section 6: “After January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”

This law seems to be a classic case of Congress choosing to make policy itself, rather than delegating responsibility to a government agency. For example, instead of making these policy decisions itself, Congress could have asked the Federal Trade Commission (FTC) to initiate a rulemaking process to determine the specific language of the warning labels. Or it could have asked the Federal Communications Commission to determine whether there were times and places when warnings would be required. But in this case, Congress chose not to do so. Instead, it spelled out the precise wording of the warning that needed to appear on packages of cigarettes; prohibited the manufacture, sale, and distribution of any packages that did not include this label; stated that the warnings had to be clear, visible, and distinct; issued a broad prohibition on advertising; and even set the exact date that this prohibition would go into effect.^{1b} The law then leaves it to the courts to determine whether anyone has violated the terms that it sets out, and even identifies the specific penalties that should be assessed on anyone found in violation.

A closer look at the law, however, reveals that it does indeed delegate responsibility to agencies. Most prominently, and most clearly, it addresses the role of the FTC, both prohibiting the agency from taking action on a rule that would affect advertising prior to July 1, 1971, *and* instructing the agency that it *can* issue trade rules that affect the advertising of tobacco products after

^{1b} Section 6 mentions the Federal Communication Commission, but only as a way to identify which broadcast mediums were covered by the ban (i.e., television and radio at the time).

that date, provided that it notify Congress of its intent to do so. It also confirms the authority of the FTC to regulate any “unfair or deceptive acts or practices in the advertising of cigarettes.”^{2b}

Additional features of the law indicate further ways in which it could be considered to delegate to other agencies. For example, the law requires both the FTC and the Department of Health, Education, and Welfare to submit yearly reports to Congress containing recommendations for related policy changes, thereby providing these agencies with the authority to continue to investigate and propose potential changes to the regulation of cigarettes. In addition, it empowers the Department of Justice to determine whether to take potential violations to the courts, giving this agency the right to determine whether, for example, a warning label was sufficiently “conspicuous.”^{3b}

^{2b} The committee report identifies a clear intention to temporarily suspend the FTC authority to issue a rule related to tobacco advertising, but then to restore it after eighteen months. See <https://web.archive.org/web/20080305012949/http://tobaccodocuments.org/atc/71066088.html>

^{3b} The law also could be construed as giving modest amounts of discretion to the Department of Defense (there are limited exemptions regarding warning labels which the military can interpret and choose to act on) and the FCC (since it can determine which mediums are covered by the advertising ban).

Appendix C

Coding Information

Search strings used for delegation of authority to agencies:

"agenc*", "bureau", "board", "commission", "department", "director", "secretar*", "administ",
"divis", "council", "instit", "attorn* general", "inspector", "presid", "offic*", "corpor*",
"depart", "chief", "governor", "member"

Search strings used for judicial review of agency actions:

"judi*", "appeal*", "appel*", "court", "district", "suit", "action", "legal", "civil", and
"review".

Appendix D

We relied on ProQuest Regulatory Insight, full text scans of laws, and judicial review provisions in order to identify delegation. Using this approach, we found many instances of laws that contain delegation, but that previous empirical studies classified as *not* containing delegation. Table D1 lists the laws that neither Epstein and O’Halloran (1999b) nor Farhang and Yaver (2016) coded as containing delegation.

Table D1: List of laws classified as non-delegating by Epstein and O’Halloran (1999) and by Farhang and Yaver (2016):

Pub. L. Num.	Year	Title	
87-041	1961	Inter-American Program--Appropriation	
94-145	1975	Consumer Goods Pricing Act of 1975	
80-471	1948	Revenue Act of 1948	
81-734	1950	Social Security Act Amendments of 1950	
81-909	1950	Excess Profits Tax Act of 1950	
83-761	1954	Social Security Amendments of 1954	
89-044	1965	Excise Tax Reduction Act of 1965	
91-124	1969	Selective Service Amendments Act of 1969	
92-336	1972	Public Debt Limitation--Extension	
92-603	1972	Social Security Amendments of 1972	
93-233	1973	Social Security Benefits--Increase	
97-034	1981	Economic Recovery Tax Act of 1981	
100-259	1987	The Civil Rights Restoration Act of 1987	
100-383	1988	Wartime Relocation of Civilians	

Again, using our approach we found delegation in each of these laws. Here are several examples, drawing from the list in Table D1 and providing examples of language in the statute that indicates delegation to an agency:

- PL 80-471: "A consent under this subsection shall be signified in such manner as is provided under regulations prescribed by the Commissioner with the approval of the Secretary"

- PL 81-909: "The Secretary shall prescribe such regulations as he may deem necessary for the application of this subparagraph."
- PL 83-761: "The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business"

In addition, Table D2 identifies several laws that Epstein and O'Halloran (but not Farhang and Yaver) classified as being non-delegating. In each of these laws, we found provisions that delegate to agencies.

Table D2: List of laws classified as non-delegating only by Epstein and O'Halloran (1999b):

83-591	1954	Internal Revenue Code of 1954
87-030	1961	Fair Labor Standards Amendment of 1961
88-038	1963	Equal Pay Act of 1963
95-030	1977	Tax Reduction and Simplification Act of 1977

Here is language from these statutes that clearly indicates delegation:

- PL 83-591: "The Secretary or his delegate may authorize Federal Reserve banks, and incorporated banks or trust companies which are depositaries or financial agents of the United States, to receive any tax imposed under the internal revenue laws, in such manner, at such times, and under such conditions as he may prescribe; and he shall prescribe the manner, times, and conditions under which the receipt of such tax by such banks and trust companies is to be treated as payment of such tax to the Secretary or his delegate"
- PL 95-030: "The taxable income shall be placed on an annualized basis under regulations prescribed by the Secretary."

Finally, Table D3 identifies laws classified as non-delegating by only Farhang and Yaver (2016), but where we found clear instances of delegation to agencies.

Table D3: List of laws not included as delegations only by Farhang and Yaver (1999):

80075	1947	Greece-Turkish Aid Act
82050	1951	Reciprocal Trade Agreements Act of 1951
82411	1952	Immigration and Nationality Act
83031	1953	Submerged Lands Act
87031	1961	Social Security Increase, 1961
87297	1961	Arms Control and Disarmament Act of 1961
87543	1962	Public Welfare Amendments of 1962
88156	1963	Maternal and Child Health and Mental Retardation Planning Amendments of 1963
89115	1965	Health Research Facilities Amendments of 1965
89675	1966	Clean Air Act Amendments of 1966
93148	1973	War Powers Resolution
106025	1999	Education Flexibility Partnership Act of 1999
107038	2001	2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States
107306	2002	Intelligence Authorization Act for Fiscal Year 2003
108177	2003	Intelligence Authorization Act for Fiscal Year 2004
109061	2005	Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising From the Consequences of Hurricane Katrina, 2005
80253	1947	National Security Act of 1947
80472	1948	Foreign Assistance Act of 1948
80897	1948	Hope-Aiken Agricultural act of 1948
81329	1949	Mutual Defense Assistance Act of 1949
81535	1950	Foreign Economic Assistance Act of 1950
81814	1950	Revenue Act of 1950
82165	1951	Mutual Security Act of 1951
82183	1951	Revenue Act of 1951
82590	1952	Social Security Increase of 1952
83358	1954	Saint Lawrence Seaway
83480	1954	Agricultural Trade Development and Assistance Act of 1954
84086	1955	Trade Agreements Extension Act of 1955
84381	1955	Minimum Wage Increase of 1955
84485	1956	Colorado River Storage Project--Authority to Construct, Operate and Maintain
84540	1956	Agricultural Act of 1956
84880	1956	Social Security Amendments of 1956 Disability Insurance
85568	1958	National Aeronautics and Space Act of 1958
85599	1958	Department of Defense Reorganization Act of 1958
85686	1958	Trade Agreements Extension Act of 1958
85835	1958	Agricultural Act of 1958
85840	1958	Social Security Amendments of 1958

85864	1958	National Defense Education Act of 1958
86778	1960	Social Security Amendments of 1960
87070	1961	Housing Act of 1961
87293	1961	Peace Corps Act
87415	1962	Manpower Development and Training Act of 1962
88272	1964	Revenue Act of 1964
89174	1965	Department of Housing and Urban Development (HUD)
89236	1965	Immigration and Nationality Act -- Amendments
89329	1965	Higher Education Act of 1965
89670	1966	Department of Transportation Act
90248	1967	Social Security Amendments of 1967
90284	1968	Civil Rights -- Riots -- Fair Housing -- Civil Obedience
90364	1968	Revenue and Expenditure Control Act of 1968
90537	1968	Colorado River Basin Project Act
90543	1968	National Trails System Act
91172	1969	Tax Reform Act of 1969
91190	1969	National Environmental Policy Act of 1969
91373	1970	Employment Security Amendments of 1970
91453	1970	Urban Mass Transportation Assistance Act of 1970
91644	1970	Omnibus Crime Control Act of 1970
92005	1971	Public Debt Limit--Interest Rate--Social Security Wage Base
92054	1971	Emergency Employment Act of 1971
92218	1971	National Cancer Act of 1971
93189	1973	Foreign Assistance Act of 1973
93344	1974	Congressional Budget and Impoundment Control Act of 1974
94012	1975	Tax Reduction Act of 1975
94143	1975	New York City Seasonal Financing Act of 1975
94566	1976	Unemployment Compensation Amendments of 1976
94588	1976	National Forest Management Act of 1976 (NFMA)
95216	1977	Social Security Amendments of 1977
95217	1977	Clean Water Act of 1977
95600	1978	Revenue Act of 1978
95617	1978	Omnibus Energy Tax Act of 1978 Public Utility Regulatory Policies Act of 1978
95619	1978	National Energy Conservation Policy Act
95620	1978	Power Plant and Industrial Fuel Use Act of 1978
96039	1979	Trade Agreements Act of 1979
96088	1979	Department of Education Organization Act
96185	1979	Chrysler Corporation Loan Guarantee Act of 1979
96223	1980	Crude Oil Windfall Profits Tax Act on Oil
97425	1982	Nuclear Waste Policy Act of 1982

98021	1983	Social Security Amendments of 1983
98144	1983	Public Holiday--Birthday of Martin Luther King, Jr.
98369	1984	Deficit Reduction Act of 1984
98573	1984	Trade and Tariff Act of 1984
99177	1985	Public Debt Limit--Balanced Budget and Emergency Deficit Control Act of 1985
99433	1986	Goldwater-Nichols Department of Defense Reorganization Act of 1986
99514	1986	Tax Reform Act of 1986
99662	1986	Water Resources Development Act of 1986
100119	1987	Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987
100485	1988	Family Support Act of 1988
101496	1990	Developmental Disabilities Assistance and Bill of Rights Act of 1990
102511	1992	Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992
102575	1992	Reclamation Projects Authorization and Adjustment Act of 1992
103433	1994	California Desert Protection Act of 1994
104004	1995	Unfunded Mandates Reform Act of 1995
104130	1996	Line Item Veto Act
104134	1996	Omnibus Consolidated Rescissions and Appropriations Act of 1996
104193	1996	Personal Responsibility and Work Opportunity Reconciliation Act of 1996
104208	1996	Omnibus Consolidated Appropriations Act, 1997
105034	1997	Taxpayer Relief Act of 1997
105089	1997	Adoption and Safe Families Act of 1997
105276	1998	Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999
106541	2000	Water Resources Development Act of 2000
107016	2001	Economic Growth and Tax Relief Reconciliation Act of 2001
107071	2001	Aviation and Transportation Security Act
107296	2002	Homeland Security Act of 2002
108007	2003	Consolidated Appropriations Resolution, 2003
108027	2003	Jobs and Growth Tax Relief Reconciliation Act of 2003
108136	2003	National Defense Authorization Act for Fiscal Year 2004
108148	2003	Healthy Forests Restoration Act of 2003
108199	2004	Consolidated Appropriations Act, 2004
108212	2004	Laci and Conner's Law
108324	2004	Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005

108357	2004	American Jobs Creation Act of 2004
108447	2005	Consolidate Appropriations Act, 2005
109002	2005	Class Action Fairness Act of 2005
109013	2005	Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005
109059	2005	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
109062	2005	Second Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising From the Consequences of Hurricane Katrina, 2005
109171	2005	Deficit Reduction Act of 2005
109366	2006	Military Commissions Act of 2006
109367	2006	Secure Fence Act of 2006
109401	2006	Henry J. Hyde United States and India Nuclear Cooperation Promotion Act of 2006
109432	2006	Tax Relief and Health Care Act of 2006
110185	2008	Economic Stimulus Act of 2008
110252	2008	Supplemental Appropriations Act, 2008
110261	2008	FISA Amendments Act of 2008
110317	2007	Hubbard Act
110369	2008	United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act

Examples of delegation language from the laws included in Table D3 include the following:

- PL 80-075: “The President may from time to time prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act.” Note: This law was excluded from Epstein and O’Halloran’s study due to an insufficient CQ summary.
- PL 82-183: “For the purposes of the certification hereunder, the Securities and Exchange Commission shall have authority to issue such rules, regulations and orders, and to conduct such investigations and hearings, either public or private, as it may deem appropriate”
- PL 84-381: “Any person aggrieved by an order of the Secretary issued under section 8 may obtain a review of such order in the United States Court of Appeals for any circuit wherein such person resides”

- PL 84-540: “The Secretary shall prescribe such regulations as he determines necessary to carry out the provisions of this title.”
- PL 99-662: “is modified to provide that the requirements of local cooperation shall be (1) 50 percent of the value of the lands, easements, and rights-of-way, (2) to hold and save the United States free from damages due to the construction works, and (3) to maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary.”
- PL 108-148: “—Not later than 30 days after the date of the enactment of this Act, the Secretary of Agriculture shall promulgate interim final regulations to establish a predecisional administrative review process for the period described in paragraph (2) that will serve as the sole means by which a person can seek administrative review regarding an authorized hazardous fuel reduction project on Forest Service land.”