

Choosing Not to Choose: When Politicians Choose to Delegate Powers*

By Stefan Voigt⁺ and Eli M Salzberger[#]

Abstract:

Elected politicians often choose to delegate competence to various agencies rather than deciding themselves.. Politicians are modeled as maximizing their self-interest and the authors set out to deal with the apparent paradox that competence is being transferred despite the fact that politicians are assumed to maximize individual utility. The constitutional structure, which is assumed to be exogenously given, serves as the independent variable in deriving hypotheses concerning delegation behavior as the dependent variable. Two categories of delegation can be distinguished: domestic delegation - to agencies within the legislators' jurisdiction - and international delegation - to supranational or international bodies. The choice of the body to which decision-making powers are transferred has rarely been analyzed within a unified framework. The paper deals with this issue.

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Zusammenfassung:

Bisweilen delegieren gewählte Politiker Entscheidungen lieber, als selbst zu entscheiden. Der Beitrag beschäftigt sich mit dem scheinbaren Paradox, daß Politiker Entscheidungskompetenz delegieren, obwohl angenommen wird, daß sie ihren individuellen Nutzen maximieren. In diesem Aufsatz wird davon ausgegangen, daß die konstitutionelle Struktur exogen gegeben ist und zur Ableitung von Hypothesen über das Delegationsverhalten als abhängiger Variabler genutzt werden kann. Dabei werden zwei Arten von Delegation unterschieden: Delegation an Akteure im Inland und Delegation an supra- oder internationale Organisationen. Die Wahl der jeweiligen Delegationsart ist bisher nicht innerhalb eines einheitlichen Ansatzes analysiert worden. Das zu ändern ist die Absicht der Autoren.

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+ Economics Department, Ruhr-University Bochum, Universitätsstr. 150, D-44780 Bochum, Germany, e-mail: stefanvoigt@lycos.de.

Law Faculty, University of Haifa, Mount Carmel, Haifa 31905, Israel, e-mail: salzberg@research.haifa.ac.il.

Résumé:

Souvent, politiciens préfèrent déléguer décisions à décider eux-mêmes. Cette contribution s'occupe du paradoxe apparent que politiciens déléguent compétences malgré supposant qu'ils maximisent leur utilité. Il est supposé que la structure constitutionnelle soit donné. Elle est usée pour dériver hypothèses concernant les décisions a déléguer compétences. Deux manières de délégation sont identifiées: délégation intérieure et délégation extérieure à des organisations inter- ou supranationales. Les auteurs tentent d'introduire un modèle unifié pour analyser les deux manières ensemble.

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I. INTRODUCTION

Interesting changes in the structures of governments and their decision-making processes have occurred during the last decades, amongst them the increasing rate of delegation of decision-making powers by elected politicians. In recent years, we have been witnessing also an increasing importance of international organizations as the bodies to which decision-making powers are delegated. While in the (close) past the most significant change in government decision-making structure was an increasing delegation of powers from legislatures to other existing branches of government (primarily the judiciary) and to newly created organs (such as independent administrative agencies), in the past few years more and more powers are delegated to international and transnational organs. The European Union might be the most striking example, but by no means is it the only one. The institutional development of monetary policy is another paradigmatic example: Many governments have delegated this competence to an independent central bank within their own jurisdiction (Cukierman and Webb 1995), thus, constituting a case of domestic delegation. But more recently, the competence concerning monetary policy is delegated also on the international level. The European Central Bank is only the most striking example. Others include currency boards and the recognition of foreign currencies as legal tender as in some Latin American countries.

Why should legislators, who are assumed to maximize their own utility, choose not to decide themselves but to delegate decision-making competences to other actors such as regulatory agencies or international organizations? This is the question that will be dealt with in this paper. Delegation of competence from legislators has been analyzed using the economic approach in three distinct frameworks: (1) the delegation of competence to international organizations, (2) the delegation of competence to regulatory agencies, created by legislators, and (3) the internal organization of legislatures in which committees are created, but remain under the legislature's supervision. The decision to delegate either to a domestic agency or to an international organization has practically never been analyzed within a single framework. The intention of this paper is to lay the basis for such a unified framework, and to widen the scope of considerations as to the decision to delegate powers.

Rational legislators will only be ready to transfer competence if the costs connected with delegation are outweighed by the corresponding benefits. Put simply: among the three alternatives of (1) deciding themselves (2) delegating competence to a domestic agency or (3) delegating competence to an international organization, rational legislators will always choose the alternative that promises the highest expected net gains. It will thus be our task to define and identify costs and benefits connected with the relevant alternatives in various decision-making situations.

The title of our paper is an allusion to an earlier paper by James Buchanan entitled "Choosing what to choose" (1994). In that paper, Buchanan is interested in the relevance of meta-preferences for the morality prevalent in a given society. By establishing constitutions, societies do not decide in any meaningful detail what sort of public goods they want to provide themselves with and in what quantities and qualities. Rather, constitutions contain the procedures and institutions that are to be used to make such decisions. Analyzing a society's choice of its constitution is, in fact, analyzing a meta-choice, namely "choosing how to choose" (Voigt 1999), or how a society chooses (on the constitutional level) how to choose later on (on the post-constitutional one). Choosing not to choose refers to a different level of choice: it is the legislature or the executive that chooses to delegate some of its preferences and therefore not to choose anymore in subsequent periods.

The present paper belongs to the rather young research program of positive constitutional economics, which is interested in explaining the emergence of particular institutions and organizations and their change over time. Politicians' decisions to delegate power domestically or internationally are made within the framework of an existing constitution. In that sense, our focus is on post-constitutional choice. Yet, by establishing new organizations, either domestically or internationally, politicians create new institutions that might themselves become influential in interpreting the constitution. In that sense, the decision to create a new agency can be viewed also as a decision to modify an existing constitutional order. It seems, therefore, adequate to describe the scope of this paper as the analysis of post-constitutional constitutional choice. Most of the hypotheses to be generated take an (exogenously given) constitutional structure as independent variable, which can be used to explain both the extent and kind of (domestic or international) delegation.

Our paper is restricted to the positive analysis of delegation of powers. It is not meant to provide a (normative) evaluation of such delegation (Majone 1996 deals with the justification of what he calls non-majoritarian institutions; on the

legitimacy of delegation see also Spence/Cross 2000). Neither do we provide a comparison of the working properties of domestic agencies vs. international organizations. These will only be relevant in the context of this paper in so far as politicians anticipate differential properties, which influence their decision to delegate.

In the next section, we offer a delineation of the basic concepts used here, primarily delegation and separation of powers. The third section contains an informal description of the various cost- and benefit-components that might play a role in the decision on whether and to whom to delegate competence. The fourth section contains a number of hypotheses concerning degree and kind of delegation to be expected under various conditions. Section five concludes.

II. DELINEATING THE BASIC CONCEPTS

Constitutions, whether written or unwritten, set the basic structure of government and allocate various decision-making powers to its branches. Rule-making power is usually allocated to the legislature.¹ Thus, “whenever rule-making powers that are not constitutionally assigned to a body other than the legislature are in fact being exercised by such a body, this can be regarded as a delegation of legislative powers” (Salzberger 1993, 359). The same can be said about other collective decision-making powers.² The delegatee can be the executive, the judiciary, a committee of the legislature, a local authority, a public corporation, a special administrative body, an international organization, or even another state.

This notion of delegation is, in fact, much broader than that of the traditional literature. It includes negative delegation, which occurs when the legislature fails to decide and thus delegates the decision-making powers to other organs by default, and *Ex post* delegation, which occurs when another organ performed decision-making and the legislature refrains from reversing (or positively affirming) the decision. The distinctions between these forms of delegation may

¹ In parliamentary systems, rule-making powers are usually assigned exclusively to the legislature, while in presidential systems these powers are shared between the legislature and the executive.

² Delegation is not necessarily confined to the delegation of rule-making powers. The executive might, e.g., decide to delegate the power to make certain decisions to administrative agencies that are not part of government. It is in this context that the distinction between intra-branch and inter-branch delegation (Cooter 2000, ch. 4) becomes relevant. An administrative agency newly created by the legislature would be an instance of inter-branch delegation whereas the founding of the same agency by the executive would be an instance of intra-branch delegation.

be of importance, as there might be asymmetry between creation costs (a decision to delegate powers) and reversal costs (a decision to cancel such delegation or to change the delegatee). In a formal sense, if delegation was done by legislation in the post-constitutional stage, canceling such delegation or changing the delegatee when it stops to be beneficial (due to delegatee drift or too much independence) should have been regarded as the same sort of decision. However, if such delegation becomes to be perceived by the public as part of the government's institutional structure, it can be interpreted as part of the *de facto*-constitution, and therefore, its revocation or amendment cannot be done as easily as its creation. In other words, path-dependence might be relevant.

The concept of separation of powers is inseparably linked to Montesquieu's *De l'esprit des loix* (1748) in which he describes a functional separation between the legislature, the executive and the judiciary. Although Montesquieu's account is based on a misinterpretation of the British system, it formed the basis for constitutional thinking in what was to become the United States of America (see Hamilton, Madison, and Jay 1788/1961). Ever since, the doctrine of separation of powers has been a hallmark of liberalism, the assumption being that state organs whose actions were monitored by other organs could do less harm.

In this context, it is important to distinguish between various sorts of separation of powers. Structures of government in which different branches can decide independently of the other branches in different areas (a rigid separation of powers) need to be distinguished from structures in which a joint decision is needed (a model of checks and balances).³ It is the latter type of separation of powers that is endorsed as a hallmark of liberalism, and has been interpreted as a constraint on politicians for the benefit of the citizens. Recently, however, some scholars have been arguing the opposite – that this kind of separation of powers can work against the citizens (see the arguments of Landes and Posner 1975, Brennan and Hamlin 1994 and Persson et al. 1997, p. 1178).

It has further been argued that separation of powers can be reconceptualized as a result of self-interested behavior of legislators or other politicians. Below, the same will be argued with regard to the delegation of powers. According to Landes and Posner (1975), legislators have an interest in an "independent" judiciary because its existence enhances the benefits a legislator can obtain from legislation.

³ Brennan and Hamlin (2000) have recently proposed to call this second version „division of power“, meaning that one particular power can only be exercised if various agents cooperate (chs. 11 and 12).

This is because an independent judiciary can prolong the life span of the legislative deals that the legislators strike with interest groups. Enhancing the durability of legislation, especially beyond the term of the legislator, increases its value for interest groups and thus increases the amount they are willing to pay the legislators for legislation. An extension of this argument to the role of the presidential veto and to the constitutional mechanism as a whole was offered by Crain and Tollison (1979a, 1979b).

Similar to the Landes and Posner's paper, we are here interested in explaining the increase in the delegation of powers that has taken place over the last couple of decades by drawing on a behavioral model of politicians that stresses their self-interest. We, therefore, view delegation of powers and separation of powers as having very similar functions vis-à-vis those who decide on them. Separation of powers can be perceived, along these lines, as constitutional delegation of powers. This statement can avoid the more loaded question – whether the two concepts are in fact the very same phenomenon.

III. BENEFITS AND COSTS OF CHOOSING HOW TO CHOOSE

1. Behavioral Assumptions

Within public choice theory, it is assumed that politicians maximize their own utility – just like everybody else. Concerning the arguments of their utility-function, we take up a conjecture similar to the one that was introduced by Frey and Lau (1968). According to it politicians are not only driven by immediate self-interest goals, but also by their ideological beliefs as to the good society and as to the policies that will promote that good. Thus, they have ideal points with regard to all policy issues that they would like to realize. Call these their ideological positions.⁴ In order to implement their ideologies they will have an interest in remaining in power as long as possible. This means that they seek re-election. Popularity is a precondition for that. Coined differently: politicians have a long-

⁴ Frey and Lau (1968) assume that politicians only choose policies that maximize their popularity when it is low or election is near. As long as it is high, they stick to their ideology. This model has been tested empirically with regard to macroeconomic policies for a number of countries (for the U.S., see Frey and Schneider 1978a, for the U.K., see Frey and Schneider 1978b, for West Germany, see Frey and Schneider 1979, and for Australia, see Schneider and Pommerehne 1980).

⁵ The relevance of politicians' ideologies as an explanatory factor for their behavior has been dealt with by, e.g., Kalt and Zupan (1984).

term interest in materializing their ideal points (and in entering history books as a major contributor to their country). However, in order to be able to make such an impact, they have to maintain their powers, and this can be done by re-election and by promotion in the political hierarchies. The difficult and tricky business of politics is to trade off long-term against short-term interests. Income is presumed to be an additional component in politicians' utility functions.

As long as implementing one's ideal points in policy space leads to an increase in one's popularity or at least does not seriously worsen the chances of being re-elected, delegation is unlikely to occur. But, when there is a trade-off between ideal points and popularity, politicians will start to consider delegating the respective issue.

2. Benefits of Choosing Not to Choose

The core question of this paper is why politicians, who are assumed to maximize their own utility, should choose not to decide themselves and instead delegate their powers. Here, we would like to list all the considerations that may come into play, those found in the literature as well as new ones. Some of these overlap with each other, and / or are using different frameworks of analysis. This includes assumptions such as the information available to the actors, the degree of uncertainty, and even their rationality. The benefits are grouped by the possible arguments in politicians' utility-functions of which we name three, popularity, ideology, and income (where popularity, as explained above, is a means to ideology and income, and not an end in itself). This mapping is, of course, not watertight and primarily serves as a structural device. The same order is applied to the cost components in the next subsection.

Components Increasing Politicians' Popularity

(a) *Delegation as a mechanism to shift responsibility*

If delegation of powers can create a-symmetry between credit and blame attributed to the politician as a result of the policy decision of the delegated body, then such delegation can be beneficial to the politician. The terms for delegation to occur within this framework were laid out by Fiorina (1982). He proposed a model built upon the assumption that there are systematic differences between the actual net benefits from regulation to the district the legislator represents and the perceived net benefits from legislators' actions. The decision to delegate hinges on the relationship between the difference between the costs of legislation and the

costs of delegation and the difference between the benefits of legislation and the benefits of delegation.

If there is a huge slippage on the cost side, a legislator will be inclined toward delegation. If there is a huge slippage on the benefit side, she will be geared toward legislation. In other words, an ability to shift blame will bring a legislator to prefer delegation; an ability to claim credit will bring her to prefer legislation. The representation structure (proportion representation vs. first past the post), party discipline and the degree of separation of powers between the legislature and the executive may have crucial impact on the benefits from delegation in this framework. A good example for delegation as a tool to shift responsibility is certain aspects of the abortion issue in the United States, which were delegated to the courts, because the issue is so controversial and crosses traditional party and geographic borders.⁵

With regard to delegation of decision-making powers to international bodies, a variant of that argument is often referred to as the scapegoat-argument (e.g. Vaubel 1994). Unpopular policies that need to be enacted (according to the ideal points of the politicians) are delegated to international body which forces a country to implement the unpopular policy and which cannot be opposed.

(b) *Delegation as a solution for problems of uncertainty*

A legislator who is uncertain as to the desirable policy or as to the consequences of realizing her ideal point for her popularity can reduce her risk by delegating the decision-making powers. For a more formal model see Fiorina (1986). Likewise, if the legislator is uncertain as to the results of regulation, or as to the political ramifications of regulation, then the delegation of the decision-making power can reduce the risk of losing support.⁶

(c) *Delegation as a tool to remain in power or maintain legitimacy*

When politicians fear a loss of legitimacy of the whole regime, they may try to establish bodies that enjoy public confidence in order to retain their rule. This can

⁶ In her model, Bawn (1995) tries to explain the degree of agency independence that the legislature chooses by focusing on the trade-off between two kinds of uncertainties: uncertainty concerning policy consequences versus uncertainty concerning agency behavior. In other words: the potential benefits of technical expertise (secured if delegation occurs) are traded off against the potential cost of losing political control due to agency drift.

characterize regimes that fear a change of government by revolution. Examples for delegation that resulted from such considerations are the establishment of the constitutional tribunal in the Soviet Union by President Gorbachev and the establishment of the constitutional court in Poland by the Communist regime in 1982 (see Brezezinski 1993).

Components Conducive to Realizing Politicians' Ideal Points

(d) *Delegation as a shift from short term to long term considerations*

This benefit focuses on the ability to use delegated bodies as a means to extend the time range of policy decisions. Politicians' immediate consideration range is the election cycle. They will tend to make such decisions that will bear fruits in the coming elections. These short-term considerations can be counterproductive in terms of their long-term interests. In such cases, it can make sense to delegate competence to an agency, which is expected to be close to one's own ideal point. Delegating the power to set the interest rate to a central bank can serve as a good example.

(e) *Delegation as a tool to protect one's policies against reversal*

Some governments decide to create independent agencies shortly before upcoming elections they are afraid to lose. The more independent these agencies are, the harder it will be for the successive government to reverse the policies of the current government (Moe 1990). Often, the constraining consequences of such delegation become only effective in the future. Therefore, this kind of delegation is connected with very low costs for current politicians in terms of lost competence.

(f) *Delegation as a tool to enhance credible commitment*

By delegating powers to bodies that are not subject to immediate and costless control by the legislature, the legislature is able to credibly bind itself to certain promises or policies. As already shown above, Landes and Posner (1975) have argued that it can pay not to be able to reverse legislation easily because this inability increases the price that legislators can demand from those who seek specific legislation. But being able to credibly commit oneself has more general effects: by not being able to expropriate investors costlessly *ex post*, the amount of investment in a given jurisdiction increases. This leads to higher growth, which, in turn, can contribute to the chances of politicians to be re-elected if the voters attribute it to government policies. It has been argued (Majone 1996, 12) that "credibility, rather than the legitimate use of coercion is now the most valuable

resource of policy-makers.” The more valuable it gets, and the more policy-makers realize that, the more they will delegate.

(g) *Delegation as the only possibility to expand the public sector*

When there are constitutional or public opinion restraints on the size of government, the only viable option for a government to extend the range of public decision-making might be the delegation of powers to newly created organizations. The creation of national agencies in the US during “the New Deal” was a method to bypass separation of power limitations.⁷

(h) *Delegation as a mechanism to enhance information*

Many decisions require technical or professional information. Such information cannot be produced by the legislators themselves and hence their need to delegate powers. Since information can be selective and manipulative, delegation, at times, will include not only the task of providing information, but also the competence to make the substantive decision based on this information.⁸

(i) *Delegation as a tool to reduce decision-making costs*

Delegation of specific tasks might be a way of reducing the size of some central hierarchies and thus reducing the decision-making costs involved. At times, this cost reduction might be greater than the additional coordination costs (plus the political costs involved in the delegation) that have to be incurred to coordinate the activities of the various agencies. The framework set by Coase (1937) can serve to analyze delegation for this reason.

Components Increasing Politicians’ Income

⁷ For an elaboration see Majone (1996/97). Lowi (1969/1979) argues that size and presence of the (U.S.) liberal state was brought about by delegation. Government responded to the demands of all major interest groups and by assigning responsibility to administrative agencies, which then became captives of these interest groups.

⁸ Calculating the consumer-price index, for example, can be perceived as a task, involving gathering of information. However, the decision which products to include into the calculation of this index and how to do this calculation, can manipulate the result. When the body assigned to provide this information is also the body assigned to decide on interest rates, it is not unlikely to assume that the informational task will be affected by policy considerations. For more on the delegation of informational tasks see Gilligan (1993) and Kirchner (1993). This consideration might be of extra weight in delegation to international bodies. These bodies function as distributors and equalizers of information among all the principals – the delegating states (see Keohane 1984 and Pollack 1997).

(j) *Delegation as a mechanism to reduce one's workload*

The utility function of politicians includes *inter alia* maximization of wealth and also leisure time. We, thus, can expect a tendency to delegate decision-making powers, even when there are no political benefits from such delegation, or even when there are some political costs of such delegation, which are outweighed by these pecuniary considerations (expressed either by more leisure or by more time for working towards additional income elsewhere).

(k) *Delegation as a tool to reduce cycling*

Social Choice theorists have shown that, when a multi-member body is engaged with decision-making, cycling is to be expected as the rule and not the exception (Arrow 1951). Shepsle and Weingast (1981) argue that cycling is reduced by procedural rules such as control of the agenda. Delegation can be considered as an alternative instrument to reduce cycling. It is of use to legislators because delegation saves them time spent on deliberation of the same issue over and over again. In that sense, delegation can be perceived as trading democracy for stability, rationality and decisiveness (see also McCubbins 1985). Based on this rationale one can explain the differences in the extent of delegation between coalition governments and single party governments.

Most of the cost components are driven by the assumption of an exogenously given constitutional structure constraining politicians in their pursuit to maximize utility. Benefits of delegation can be interpreted as the capacity to loosen these constraints. Most of the components assume a democratic constitution to be in place. Delegation is, however, also observed in non-democratic states and a general theory of delegation should also be applicable to them. This is indeed the case since a certain minimum amount of popularity is needed for government survival in every regime. Benefit component c takes this explicitly into account.

3. Costs of Choosing Not to Choose

Delegation of powers involves also costs. The major cost categories are presented in a similar fashion as the benefit components, this time as aspects that might reduce utility.

Components Decreasing Politicians' Popularity

(a) *Reversal cost*

The costs of reversing a regulation set by a delegatee body are likely to be significantly higher than reversal of legislators' own policy. For example: the cost of a reversal of a court decision, which held a statute as unconstitutional is much higher than passing a law amending a previous legal arrangement.

Components Detrimental to Realizing Politicians' Ideal Points

(b) *Delegatee drift*

By delegating decision-making powers, legislators decrease their impact and control on the policy chosen (*ex ante* as well as *ex post*). There is always the risk that a delegatee body would drift away from the most preferred position of the legislature and would lack responsiveness, even under detailed standards set by the delegation body. To a large extent, drift will depend upon the structural components of the delegated body. These costs can be analyzed within the principal-agent framework (Kiewiet and McCubbins 1991)

(c) *Legitimacy drift*

Delegation of powers can create legitimacy drift in the sense that the legitimacy of the legislature decreases in comparison to the legitimacy that the public attributes to an (independent) agency. This drift might have an effect on the political power of legislators to push for policies which they choose to regulate themselves, and indeed it might affect the legitimacy of the legislature as a whole and the constitutional equilibrium.⁹

(d) *Co-ordination cost*

When more than one body is taking part in decision-making, there are additional costs, which are the result of inconsistencies and overlapping competence. Two aspects of these costs can be distinguished. First, there might be more than one principal trying to exert influence on a delegatee. This case appears to be especially relevant with regard to international organizations, especially if the group of states founding an international organization is not perceived as one monolithic bloc having homogenous preferences, but being made up of various actors with different interests. Belonging to the minority can imply the cost of being moved away from one's ideal point.

⁹ Delegation was also mentioned as a tool to enhance or maintain legitimacy and thus as a possible benefit. A more detailed analysis would have to specify the conditions under which the benefits or costs prevail.

The second aspect includes cases in which more than one agency is concerned with one issue. This situation creates the necessity for co-ordination between these agencies. Even in cases where the competence of each institution is defined in details, frictions cannot be avoided. This second component could already be grouped within the next group of cost components because co-ordination of various agencies is costly in terms of time and therefore reduces politicians' income.

Components Decreasing Politicians' Income

(e) *Monitoring cost*

As the result of possible drift (and within the analytical framework of principal-agent theory), the delegating bodies have to create monitoring mechanisms. Such mechanisms, whether "police-patrol oversight" or "fire-alarm oversight" (McCubbins and Schwartz 1984) add to the cost of the decision-making process. The costs accruing to politicians for monitoring will most likely not be in pecuniary terms but rather in opportunity costs of time spent on monitoring.

(f) *Utility forgone as consequence of reduced rent seeking*

Delegation can imply that legislatures become less attractive for special interest groups because they abdicate the competence to meet their changing special interests. In whatever coin legislators are paid by special interest groups, they will be paid less after delegation.¹⁰

When dealing with the benefits of delegation, the emphasis was on the possibility to increase one's popularity (or to prevent it from decreasing). When dealing with the costs, the emphasis was on possible reductions in politicians' income. In future studies, a more detailed account of these components might be helpful not only in understanding why delegation occurs in some cases and not in others, but also in understanding, why international delegation is sometimes preferred over domestic delegation.

¹⁰ It has been argued, however, that agencies are more prone than legislatures to be captured by interest groups (Fiorina 1977 and Spitzer 1988). If this is the case interest groups will prefer delegation and therefore delegation may not amount to a cost vis-a-vis the legislator.

IV. SOME HYPOTHESES REGARDING EXTENT AND KIND OF DELEGATION

The long list of considerations for and against delegation might be realistic, but it certainly does not advance us towards a coherent and unified framework for rigorous analysis. On the contrary, this multi-benefits and costs structure can hint at contradicting patterns, which beg more careful modeling and investigation. Following are several examples for these contradicting patterns, which are relevant to questions addressed in this paper and which call for further research.

1. The Effects of the Size of the Polity on the Width of delegation

Usually the size of government corresponds to the size of polity. Small countries (in terms of population size) have smaller governments (for example, number of members in parliament) than bigger countries. However, since the extent of public decision-making in smaller countries does not shrink in the same proportion to their size, we can expect that smaller countries will compensate themselves for having small governments by delegating more, especially internationally (see also Keohane and Martin 1994, 15). The larger the polity – and thus the government – the larger the scope for specialized agencies. In that sense, we can expect a more fine-grained distribution of powers in larger polities and thus more internal delegation.

Focusing on delegation as a method to enhance information (consideration h) may also indicate a positive correlation between the size of the polity and the width of internal delegation. As the problems of obtaining information are greater in a big polity, we can expect more delegation there in order to overcome informational problems. In addition, bigger countries, usually with bigger legislatures, may suffer more from collective decision-making problems and hence will seek more delegation (consideration k).

To summarize, differences in size may affect not only the extent of delegation, but also whether competence is delegated domestically or internationally. Small polities will display a higher propensity to delegate to international bodies.¹¹ However, big states can have relatively more power in international organizations and might be able to seek higher rents from such institutions, while smaller

¹¹ Indeed, we know that some of the most keen delegators to international and supra-national bodies are the small polities (e.g. the Benelux countries who are in the forefront of delegating powers to the EU and international organizations).

countries will not be able to afford themselves to remain out, and will, thus, join under worse conditions.¹²

2. The Effects of Constitutional Structure on Delegation of Powers

The constitutional setup can have significant effects on the width of post-constitutional delegation, on its features and on the question we focus on – whether delegation is made to domestic or to international bodies.

The relations between the mold of separation of powers and delegation

Various considerations point at contradicting directions. On the one hand, countries with a real separation between the legislature and the executive (presidential democracies) will encounter more collective decision-making problems, and therefore we can expect more delegation of powers in such countries (consideration k). A similar argument can be made with regard to federalism: here the number of actors is even higher and simply delegating some powers to independent bodies can save some coordination costs. Indeed, this factor may explain, for example, the strength of independent administrative agencies in the United States (Spiller 1990), as well as the wide powers and the impact of the judiciary there, in comparison to their status in the U.K. On the other hand, when rule-making powers are shared between two branches of government, the need and potential benefits from shifting responsibilities (consideration a) are lower, as the two branches can shift responsibilities to each other. Also, in such systems there might be less need for delegation as a mechanism to enhance credibility (consideration f).¹³

The internal structure of government and the existing degree of domestic delegation may also have a significant effect on international delegation. Here,

¹² Keohane and Martin (1994). For an opposing view see Olson and Zeckhauser (1966) who argue that the large countries are exploited by the small. Kindleberger (1986) has a similar argument with regard to free trade regimes which he considers as a public good produced by the large countries.

¹³ Keohane and Martin (1994) observe that delegation of authority often involves a power shift from the legislature to the executive. We can hypothesize here that rational legislators in parliamentary systems will *c.p.* have a higher propensity to delegate than in presidential ones because in order to stay in office, the executive in parliamentary systems depends on the continuous support of parliament. Delegatee-drift will thus be less severe in parliamentary systems and delegation might be connected with positive expected utility when it would only promise negative expected utility in presidential systems.

too, we may find contradicting hypotheses. For example, we can expect that if there is already wide domestic delegation to bodies with broad structural independence, the cost for politicians of international delegation will be low and hence more such delegation will occur, and vice versa. The hesitance of Britain to delegate powers to the European Union can fit this hypothesis. In addition, such international delegation can also occur as an attempt to curtail powers of domestic delegates who, in the eyes of politicians, stretched their powers too far. However, some incentives to delegate may be weakened; if there are already expedient domestic agencies, potential benefits from shifting responsibilities (consideration a) will be lower.

These conflicting considerations point toward the necessity of distinguishing static from dynamic analyses. The reasons for initial delegation of powers may be different from those that evolve over time. Shifts from domestic to international delegation might only be explainable if this is accounted for.¹⁴

The relations between the election system and delegation of powers

It is well known that a plurality rule for electing legislators (first past the post) is conducive to a two-party-system (Duverger's Law). Our first hypothesis is that delegation will be more attractive within a constitutional structure conducive to a two-party-system because the heterogeneity of the electorate of any single party will be higher than under proportional representation (PR). A more heterogeneous electorate means that the probability that many policy issues will be a mixed bag for the electorate of a party is higher than under proportional representation. Because parties cannot "fine tune" their positions, they have a higher propensity to delegate in order to shift responsibility (consideration a), in order to overcome problems of uncertainty (consideration b) and as a tool to solve collective decision-making problems (consideration k).

A second factor might also play a role: in plurality rule systems, the reversibility of decisions is systematically higher than in PR systems. In order to prolong the effects of its current policies, a majority of legislators fearing of not being the majority tomorrow, might have incentives to delegate to an agency if it believes

¹⁴ "Re-delegation" (e.g. from domestic to international organizations) within a perfect rationality framework appears primarily plausible if at the time of first time delegation to a national agency, an option to delegate internationally was not available. If we allow for bounded rationality, re-delegation might be an attempt to take competence away from an agency whose decisions haven't pleased the legislators.

that it can determine its policy for a longer time period (Moe 1990). This argument can actually also be read as an application of the Landes-Posner (1975) model to the question of delegation in general. It also corresponds to three of the considerations for delegation mentioned above - consideration b: solution to uncertainty, d: long-term vs. short-term time horizon, and f: credible commitment consideration, and.

A related issue is the role of parties versus the role of individual politicians. It can be hypothesized that strong parties are conducive to a long-term orientation whereas systems in which individual politicians play a dominant role will tend to display a more short-term orientation. For an individual who knows that his (individual) career has a definite end, other strategies will be dominating than for a party whose members expect to play an infinitely repeated game (Brennan and Kliemt 1994). The future will thus be less heavily discounted in systems in which the relevant actors are constrained by their parties. That, in turn, means that the problem of time-inconsistent preferences is less severe in systems with strong parties. It follows that the necessity to delegate in order to protect oneself against one's own inconsistent time-preferences is lower in strong party systems. On the other hand, it can be argued that when the party is the more dominant policy promoter, more delegation will be required to secure the long term results, which might be unpopular in the short run (considerations a and d). The comparison between the vast delegation of powers in the U.S. and the more limited delegation of powers in Britain, two systems with plurality elections (rather than PR) can support the latter hypothesis.¹⁵

Differences in the geographical aspect of the voting system can be an additional factor influencing the width and mode of delegation. On the one extreme, we find systems, which set up the entire country as one single district. On the other extreme, there are systems in which there are as many districts as legislators. In the latter, representatives will typically not be judged by overall performance of government, but by what they did for their constituency. In order to pass legislation, logrolling will often be necessary. This, however, entails the possibility of passing many budget-relevant decisions that do not have net advantages for the country as a whole. If legislators are also interested in a more national minded decision-making, or if they are enforced by party discipline to vote for decisions, which do not benefit their constituency, then they might have

¹⁵ Although an additional (and maybe the more crucial) factor for the differences between those two countries is the mode of separation of powers.

an interest in constraining their power by transferring it to an independent agency that does not depend on the support of individual districts.

The status of the judiciary and the character of legal culture

The judiciary is one of the possible delegates, which our analysis attempts to address, and its de facto powers will be affected by the extent of delegation to it. However, the judiciary is also a branch of government, and the constitutional provisions dealing with its jurisdiction and independence are bound to have an effect on the post-constitutional width and targets of delegation.

It can be hypothesized that the more independent the judiciary of a country is, the higher are the incentives to create agencies other than the judiciary and to delegate powers to them. When the *de jure* and *de facto* independence of the judiciary are very high, judges will be less self-restrained in overruling legislation and in interpreting it against the current government's interests, and legislators will have to bear high costs if they do not follow court rulings. By attempting to create other independent agencies, politicians could try to increase their influence. The risk involved in having agencies' decisions overruled by the judiciary is probably not as (politically) costly as the risk of seeing legislation overruled. The American-British comparison, again, supports this hypothesis. In this respect, the question of domestic or international delegation might be relevant, as decisions of international bodies are more immune from being overturned by the judiciary than decisions of domestic agencies. We can thus add the prediction that a powerful judiciary will lead to more international delegation.

On similar grounds, one can hypothesize that delegation of powers will be wider in countries that are based on the common law tradition, and narrower in civil law countries. First, courts in common law countries tend to be more innovative and active. In line with the rationale outlined above, it can be expected that this will lead to more delegation by the legislature to other agencies. Second, if one assumes that legislators have an interest in consistent policies - because such policies allow expectations that have a good chance of turning out to be correct, which is conducive to economic growth - then they would have a higher propensity to delegate power in common law systems.

A country's constitution might require a certain supermajority for delegation of competence. Naturally, if legislation can be passed by simple majority vote, while delegation requires a supermajority, we will see less delegation than in countries that do not discriminate between the two. In this respect, there might be a difference between the majorities required for domestic and international

delegation. In some countries, for example, the authority to sign international treaties is in the hands of the executive, which means that international delegation is easier to exercise than domestic delegation. In other countries, such treaties require the approval of the legislature, making international delegation more difficult to exercise than domestic delegation. These constitutional provisions will affect not only the extent of delegation, but also the subject matter of delegation. We can expect that the executive will tend to delegate different issues than the legislature. These differences will be further contingent upon the mode of separation of powers.

3. The Sort of issues delegated

If one analyses delegation from the point of view of informational benefits (consideration h), it will be fair to hypothesize that in areas of economic and social policies, where the demand for expertise is high and policy objectives can be defined fairly precisely, delegation will be more frequent. This is in contrast to cases where the objectives themselves are controversial (i.e. politicized areas of decision-making) in which we can expect less delegation. The costs of a delegatee drift can re-affirm this prediction, as these costs are likely to be greater where the delegatee is empowered to make primary arrangements (for a similar analysis see Majone 1996, 13). However, the shifting responsibility framework (consideration a) might indicate an opposite trend, as the benefits from responsibility shifts can be especially significant in controversial issues.¹⁶

4. The Institutional Features of Delegated Bodies

The subject issue of delegation will have an impact on the identity of the delegatee – domestic or international – and on its degree of specialization. Efficiency grounds (consideration h) may indicate the viability of creating specialized delegates, such as specialized courts, which are one of the characteristics of the German political-legal system, for example. This can also

¹⁶ The main focus of Epstein and O'Halloran (1999) is on the kind of issues that tend to be delegated. They analyze major policy initiatives that have taken place in one jurisdiction – namely the U.S. Our approach is a different one. We compare kind and width of delegation as a result of different constitutional structures. Epstein and O'Halloran (1999) are mainly interested in the relationship between executive and legislature. This is why they hardly differentiate between the different players within the executive (bureaus, agencies and the like).

contribute to minimizing the delegatee drift, as specialized courts are easier to direct and monitor. On the other hand specialized bodies create co-ordination problems (such as the need to convene greater senates in the German courts system, when there are conflicting decisions or disputes about jurisdiction), which are bound to increase the decision-making cost.¹⁷

5 Summary and Outlook

We have focused here on some possible considerations (and the interrelations among them) of legislators in deciding whether to delegate their powers and whether to do it domestically or internationally. The interdependence between domestic and international agencies has only been alluded to in a very specific sense, namely that legislators who are disappointed with the decisions of a domestic agency might therefore be led to delegate some of its power to an international one. Yet, there are other aspects of interdependence: the decisions of international agencies might have repercussions on the leeway that remains with domestic ones. The jurisdiction of the European Court of Justice, e.g., has direct effects on the jurisdiction of national courts.

In future papers, the strategic interaction that might occur between various agencies would have to be taken into account explicitly. Here, we hypothesized that the degree to which the judiciary is independent and decides in ways adversary to the preferences of the legislature, has an influence on the propensity to create other – possibly less independent – agencies. The strategic interaction and possible repercussions on the legislature have, however, not been analyzed here.

A different strategy towards expanding our knowledge concerning the delegation of powers is to make the hypotheses contained in section 3 more explicit and to test them empirically. The delegation of powers would appear as the dependent variable and one would thus need an indicator for the degree of delegation. Since the specific research question is whether domestic or international delegation will be chosen, we need a more precise indicator that distinguishes between domestic and international delegation. Candidates for measuring international delegation could be whether there is a constitutional basis for transferring sovereign rights, what status international law and international agreements enjoy in the legal

¹⁷ See the presentation of this dilemma in terms of external vs. internal decision-making costs in Bishop (1990).

system of the various countries and – of course - the number of international organizations that a country is member of. All these are items for analysis in future papers.

Bibliography

- Arrow, Kenneth (1951). *Social Choice and Individual Values*, 2nd ed. New Haven: Yale University Press.
- Bawn, Kathleen (1995). Political Control versus Expertise: Congressional Choices About Administrative Procedures, *American Political Science Review*. 89(1): 62-73.
- Bishop, William (1990). A Theory of Administrative Law, *Journal of Legal Studies*. 19: 489-530.
- Brennan, Geoffrey and Alan Hamlin (1994). A Revisionist view of separation of powers, *Journal of Theoretical Politics*. 6: 345-368.
- Brennan, Geoffrey and Alan Hamlin (2000). *Democratic Devices and Desires*. Cambridge: CUP.
- Brennan, Geoffrey and Hartmut Kliemt (1994). Finite Lives and Social Institutions, *Kyklos*. 47(4): 551-71.
- Brezekinski, M., (1993). Constitutionalism Without Limits, *East European Constitutional Review*. 2(2): 38.
- Buchanan, James M. (1994). Choosing What to Choose, *Journal of Institutional and Theoretical Economics*. 150(1): 123-135.
- Coase, Ronald (1937). The Nature of the Firm, *Economica*. 4:386-405.
- Crain, Mark and Robert Tollison (1979a). Constitutional Change in an Interest Group Perspective, *Journal of Legal Studies*. 8: 165-75.
- Crain, Mark and Robert Tollison (1979b). The Executive Branch in the Interest Group Theory of Government, *Journal of Legal Studies*. 8: 555-67.
- Epstein, David and Sharyn O'Halloran (1999). *Delegating Powers – A Transaction Cost Politics Approach to Policy Making under Separate Powers*. Cambridge: CUP.
- Fiorina, Morris (1977). *Congress: Keystone of the Washington Establishment*. New Haven: Yale University Press.
- Fiorina, Morris (1982). Legislative Choice of Regulatory Forms: Legal Process or Administrative process, *Public Choice*. 38: 33-66.
- Fiorina, Morris (1986). Legislator Uncertainty, Legislative Control and the Delegation of Legislative Powers, *Journal of Law, Economics and Organization*. 2: 33-51.
- Frey, Bruno S. (1997). The public choice of international organizations, in: Dennis C. Mueller (ed.), *Perspectives on Public Choice - A Handbook*. Cambridge: Cambridge University Press, 106-23.
- Frey, Bruno S. and L.J. Lau (1968). Towards a Mathematical Model of Government Behavior, *Zeitschrift für Nationalökonomie*. 28: 355-80.
- Frey, Bruno S. and Friedrich Schneider (1978a). An Empirical Study of Politico-Economic Interaction in the U.S., *Review of Economics and Statistics*. 60: 174-83.

- Frey, Bruno S. and Friedrich Schneider (1978b). A Politico-Economic Model of the United Kingdom, *Economic Journal*. 88: 243-55.
- Frey, Bruno S. and Friedrich Schneider (1979). An Econometric Model with an Endogenous Government Sector, *Public Choice*. 34(1): 29-43.
- Gilligan, Thomas (1993). Information and the Allocation of Legislative Authority, *Journal of Institutional and Theoretical Economics*. 149: 321-341.
- Hamilton, Alexander, James Madison, and John Jay (1788/1961). *The Federalist Papers*, with an introduction by C. Rossiter, New York: Mentor.
- Hirschman, Albert O. (1970). *Exit, Voice and Loyalty - Responses to Decline in Firms, Organizations, and States*. Cambridge: Harvard University Press.
- Kalt, J. and M. Zupan (1984). Capture and Ideology in the Economic Theory of Politics, *American Economic Review*. 74(3): 279-300.
- Keohane, Robert O. (1984). *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton: Princeton University Press.
- Keohane, Robert O. and Lisa L. Martin (1994). Delegation to International Organizations; presented at a conference on "What is Institutionalism Now?" at the University of Maryland in October 1994.
- Kiewiet, D. Roderick and Mathew McCubbins (1991). *The Logic of Delegation: Congressional parties and the appropriation process* Chicago: University of Chicago Press.
- Kindleberger, Charles (1986). International Public Goods without International Government, *American Economic Review*. 76(1): 1-13.
- Kirchner, Christian (1993). Information and the Allocation of Legislative Authority – comments, *Journal of Institutional and Theoretical Economics*. 149: 342-346.
- Landes, William and Richard Posner (1975). The Independent Judiciary in an Interest-Group Perspective, *The Journal of Law and Economics*. 18(3): 875-911.
- Lowi, Theodore (1969/1979). *The End of Liberalism – The Second Republic of the United States*. New York: Norton; 2nd edition.
- Majone, Giandomenico (1996). Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions, European University Institute, Working Paper RSC No. 96/57.
- Majone, Giandomenico (1996/97). The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union, *EIPASCOPE* 9-14.
- McCubbins, Mathew (1985). The Legislative Design of Regulatory Structure, *American Journal of Politics*. 29: 721.
- McCubbins, Mathew and Thomas Schwartz (1984). Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms, *American Journal of Political Science*. 28: 165-79.
- Moe, Terry (1990). Political Institutions: The Neglected Side of the Story, *Journal of Law, Economics, and Organization*. 6: 213-53.
- Montesquieu, Charles L de (1748/1989). *The Spirit of the Laws* (Cambridge Texts in the History of Political Thought). Cambridge: Cambridge University Press.
- Olson, Mancur and Richard Zeckhauser (1966). An Economic Theory of Alliances, *Review of Economics and Statistics*. 48:266-79.

- Persson, Thomas, Gérard Rolland and Guido Tabellini (1997). Separation of Powers and Political Accountability, *Quarterly Journal of Economics*. 112: 1163-1202.
- Pollack, Mark. (1997). Delegation, agency, and agenda setting in the European Community, *International Organizations*. 51: 99-134.
- Salzberger, Eli M. (1993). A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary? *International Review of Law and Economics*. 13: 349-79.
- Schneider, Friedrich and Werner Pommerehne (1980). Politico-Economic Interactions in Australia: Some Empirical Evidence, *Economic Record*. 56: 113-31.
- Shepsle, Kenneth and Barry Weingast (1981). Structure Induced Equilibrium and Legislative Choice, *Public Choice*. 37: 503.
- Spence, David B. and Frank Cross (2000). A Public Choice Case for the Administrative State, *Georgetown Law Journal*
- Spiller, Pablo, (1990). Politicians, interest groups and regulations: a multiple principal-agency theory of regulation or “let them be bribed”, *Journal of Law and Economics*. 33: 65.
- Spitzer, M. (1988). “Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory”, *Southern California Law Review*. 61:1293-1326.
- Vaubel, Roland (1994). The public choice analysis of European integration: A survey, *European Journal of Political Economy*. 10: 227-249.
- Voigt, Stefan (1999). Choosing How to Choose - the Narrow Path Between Effective Constitutions and Wishful Thinking in Constitutional Choice, Discussion-Paper No.15-99 of the Max-Planck-Institute for Research Into Economic Systems, Jena, Germany.